Anderson Enterprises, d/b/a Royal Motor Sales *and* Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO *and* Automotive Machinists Local Lodge 1305 and Machinists Automotive Trade District Lodge No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO

German Motors Corporation *and* Automotive Machinists Local Lodge 1305 and Machinists Automotive Trade District Lodge No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO *and* Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO *and* Auto, Marine and Specialty Painters Union, Local 1176

San Francisco Honda *and* Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO. Cases 20–CA–22989, 20–CA–23045, 20–CA–23047, 20–CA–23048, 20–CA–20349, 20–CA–23064, and 20–CA–23292

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On December 30, 1993, Administrative Law Judge Michael D. Stevenson issued the attached decision.[1] The General Counsel and the Respondents filed exceptions and supporting briefs. Charging Party Unions also filed exceptions.[2] Thereafter, the Respondents filed answering briefs in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order only to the extent consistent with this decision.[4]

The principal issue is whether a valid bargaining impasse existed prior to the implementation of the Respondents' final offers to the Unions during negotiations in 1989.[5] The judge found that a valid impasse existed in negotiations between Respondent Royal Motor Sales (Royal) and Automotive Machinists Local Lodge 1305 and Machinists Automotive Trade District Lodge No. 190 of Northern California (the Machinists), between German Motors Corporation (German) and the Machinists, between German and Auto Marine, and Specialty Painters Union, Local 1176 (the Painters), and San Francisco Honda (Honda) and Teamsters Automotive Employees Local 665 (the Teamsters). We disagree for the reasons discussed below.

[1] By Order dated November 24, 1995, the Board granted the General Counsel's unopposed motion to withdraw the charge and complaint in Case 20–CA–23046 (Honda/Machinists) based on a non-Board settlement. By order dated November 16, 1998, the Board granted the General Counsel's unopposed motion to withdraw the charge and complaint in Cases 20–CA–22989 and 20–CA–23292 (Royal-Teamsters), based on a non-Board settlement.

[2] Each Charging Party Union filed a document in which it joined in the exceptions of the General Counsel. Charging Parties Painters Local 1176 and Machinists Local Lodge 1305 also filed exceptions separate from those of the General Counsel. Finally, Painters Local 1176 filed a supplemental brief.

[3] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We adopt the judge's findings concerning German/Teamsters negotiations in Case 20–CA–23048. In doing so, we agree with the judge's finding in fn. 51 of his decision that German's direct dealing with parts department employee Kenneth Kirk about the contents of German's incentive pay plan is not time-barred by 10(b) of the Act. To prevail in its 10(b) defense, the Respondent must show that the events in issue occurred outside the 10(b) period. Respondent German has not satisfied its evidentiary burden.

The 10(b) period in this case commenced on June 15, 1989. Respondent German has not shown either that the conduct alleged here to be unlawful occurred before June 15 or that it could not have occurred thereafter. The Respondent's parts manager, Mark Binkin, testified that he discussed the concept of incentive pay with parts department employee Kirk while Binkin was "trying to formulate . . . a base salary kind of deal and incentive program." Binkin was uncertain of the dates of these discussions. Kirk's credited testimony reveals that in late June or early July the Respondent's parts manager, Mark Binkin, "broached the subject [of an incentive pay plan] to me and asked me my opinion on it." Kirk described the plan "broached" by Binkin as a "precursor" to the incentive pay plan proposed by the Respondent. Kirk further testified that, after that initial discussion, Binkin spoke with him on at least two subsequent occasions about incentive pay plans.

Respondent German first presented an incentive pay proposal for the parts department to the Teamsters on June 6, 1989, and it presented a revised incentive pay proposal on June 21. In light of the testimony of Binkin and Kirk, the timing of the Respondent's presentation of its incentive pay proposals to the Teamsters supports a finding that Binkin dealt with Kirk regarding incentive pay within the 10(b) period. We infer from the facts that the Respondent continued to develop the specifics of its incentive pay proposal between June 6 and 21, and that Binkin's discussions with Kirk continued during this period, until the revised proposal was submitted. Thus, we find that Binkin dealt with Kirk regarding incentive pay after the 10(b) period began to run on June 15.

Member Brame notes that no exceptions were filed to the judge's finding of 8(a)(1) violations by Respondent Royal Motors.

Member Brame agrees with his colleagues that German General Manager Henry Schmitt violated Sec. 8(a)(1) by telling employee Martin that he could not participate in German's 401(k) plan unless he resigned from the Union. He finds it unnecessary to pass on the judge's finding that Schmitt also violated Sec. 8(a)(1) by telling employee Kirk that "this is a time for no unions and no hard feelings" as this finding would be cumulative of other unfair labor practices found and would not materially affect the remedy.

[5] All dates are in 1989 unless otherwise indicated.

We address each set of negotiations seriatim. We find it unnecessary to recount all that transpired during the bargaining which took place over 52 negotiating sessions, since those details are set forth in the judge's decision. A brief recapitulation of the judge's findings and conclusions and of salient facts that are relevant to our legal analysis of the unfair labor practice issues will suffice.

I. ROYAL/MACHINISTS NEGOTIATIONS (20–CA–23047)

A. Royal's Unfair Labor

B. Practices Occurring Prior to Implementation of Its Final Offer

1. Unlawful statements by Chavez

There are no exceptions to the judge's findings that Royal's Service Manager, Paul Chavez, made several statements that violated Section 8(a)(1). Specifically, sometime in June, Chavez told Royal mechanic Nelson Wong that if the Union were not there, Wong could make more money under the flat-rate system of compensation that Royal was offering. In addition, just before the Teamsters' contract at Royal expired in late June, Chavez told Royal parts counterman Michael Reuschel that any employees who stayed on would have to be nonunion or they would be replaced. The judge also credited former Royal service employee Charles Williams' testimony that in June or July, before the July 3 lockout, Chavez asked Williams to sign a petition to get rid of the Union and offered Williams a bonus to enlist other employees to sign the petition.[6]

2. Direct dealing in the Machinists unit

The judge dismissed direct dealing allegations for lack of credible evidence. We find merit in the exceptions to this dismissal.[7] We have found that Service Manager Chavez violated Section 8(a)(1) by telling mechanic Wong that he would earn more money under its proposed flat-rate system if the Union were not there. Chavez's conduct also was alleged to be, and we find that it was, unlawful direct dealing and bypassing of the Machinists in violation of Section 8(a)(5).[8]

It is well established that an employer violates Section 8(a)(5) and (1) of the Act by meeting with employees to discuss wages without the presence of their designated collective-bargaining representative. See, e.g., *Limpco Mfg., Inc.*, 225 NLRB 987, 990 (1976); *Bueter Bakery Corp.*, 223 NLRB 888, 890 (1976). Such direct dealing, particularly when negotiations with the union are occurring, is inconsistent with the employer's statutory bargaining obligation, tends to undermine the status of the bargaining agent, and interferes with employees' Section 7 rights. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944).

B. The Judge's Finding of a Royal/Machinist Impasse

The judge found that there had been adequate discussion of the major issues (i.e., wages, health and welfare, and pension/retirement) during the seven bargaining sessions that took place between the parties before Royal declared impasse. Thus, the judge concluded that Royal met its burden of proving the existence of an impasse prior to its July 5 partial implementation of its final offer to the Machinists.

In reaching his conclusion, the judge found that Royal had made clear, from the outset, that it would insist on a flat-rate compensation system. He found no evidence that the Machinists ever seriously considered, or agreed to, the flat-rate system, as defined by Royal. In making this finding, the judge rejected as "not to be taken at face value" a June 30 statement by the Machinists' attorney-negotiator Burton Boltuch that the Machinists would sign a contract with flat-rate compensation if ancillary issues concerning comebacks,[9] compensation levels, and nondiscriminatory dispatching could be resolved. The judge further found that that Boltuch did not seriously advance the Machinists' handwritten July 3 "Union Partial Offer on Flat Rate," which had been conveyed to Royal through Federal Mediator Jacobsen, and that, in any case, the partial offer "failed to embrace the essence of flat rate, which is the hourly allotment of time according to standard manuals." The judge found that the lack of agreement on the single, critical issue of flat-rate compensation generally precluded agreement between the parties. The judge also rejected the General Counsel's argument that other unlawful conduct by Royal, discussed below, foreclosed an impasse finding, noting, inter alia, that there were not separate complaint allegations of bad-faith bargaining.

C. Discussion and Analysis of the Royal/Machinist Impasse Finding

In *Taft Broadcasting*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board defined an impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." This principle was restated by the Board in *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), as follows:

[6] Williams testified that on another unspecified occasion he heard Chavez tell employee Rich Powell that it was useless to wear a union hat because there was not going to be a Union anymore. In the absence of exceptions, we adopt the judge's finding that Chavez made this statement to Powell in July; however, we do not consider it in our impasse analysis because it is unclear whether this occurred before Royal declared impasse and implemented its proposals.

[7] Machinists did not except to the judge's dismissal of this allegation; however, Painters has excepted to the dismissal.

[8] See par. 8(a) of the complaint in Case 20–CA–23047.

[9] The term "comeback" refers to improperly completed work that must be redone or corrected when a customer returns a vehicle to the shop.

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

See also *NLRB v. Powell Elec. Mfg.,* 906 F.2d 1007, 1011–1012 (5th Cir. 1990). The Board has further held that, even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. *Tom Ryan Distributors*, 314 NLRB 600, 604–605 (1994), enfd. mem. 70 F.3d 1272 (6th Cir. 1995) (no impasse found where union demonstrated intent to move on key issue, parties had met only 8 times before employer declared impasse, and the key issue had been discussed conceptually but not in detail). "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), quoting *Charles D. Bonanno Linen Service*, 243 NLRB 1093–1094 (1979).

The Board has also long held that even if the parties have reached deadlock in their negotiations, a finding of impasse is foreclosed if that outcome is reached "in the context of serious unremedied unfair labor practices that affect the negotiations." *Noel Corp.*, 315 NLRB 905, 911 fn. 33 (1994) (citing cases), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996). Accord: *Great Southern Fire Protection,* 325 NLRB No. 13 (1997).

a. Contrary to the judge, we find that Royal and the Machinists were not at impasse over the flat-rate compensation issue on July 5. To be sure, up through June the parties had adamantly maintained opposing positions on the wage issue. Royal was insisting on changing the method of determining the employees' compensation to a new flat-rate system which would assign fixed values to particular types of repairs, and the Machinists were vociferously adhering to the current system of hourly wage rates. As explained below, however, this deadlock was broken on July 3, when the Machinists submitted a written proposal that represented their agreement to bargain on the basis of a flat-rate model.[10]

During their July 3 negotiating meeting, the Machinists conveyed to Royal, via the Federal mediator, a handwritten document entitled "Union Partial Offer on Flat Rate" (G.C. Exh. 35, partial offer).[11] In the partial offer, Machinists proposed, for the first time, to include in the bargaining agreement a flat-rate compensation provision consistent with Royal's proposal, but with changes aimed at resolving Machinists' ancillary concerns about issues including comebacks, compensation levels, and nondiscriminatory dispatching. Among other provisions, the partial offer sought to change the guaranteed minimum base wage rate from $10 per hour actually worked, as set forth in Royal's proposal, to "85% of flat-rate compensation level." Thus, it is clear that the Machinists accepted the concept of compensating employees based on the computation of flat-rate hours.

We find that the partial offer constituted significant movement that provided a basis for further bargaining, both because it demonstrated bargaining flexibility, and because it made clear that the Machinists' previously expressed opposition to flat-rate compensation was not firm. Cf. *Stephenson-Yost Steel*, 294 NLRB 395, 396 (1989) (no impasse where employer refused even to explore a union's offer to discuss potential tradeoffs in return for the union's primary objective). In our view, the Machinist's offer on this pivotal issue increased the possibility of reaching agreement on a contract and foreclosed an impasse finding at that time based on the flat-rate issue. As the D.C. Circuit Court of Appeals has noted:

> The mere fact that the Union refuses to yield does not mean that it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process.

[10] Because we premise our finding of no impasse on the new development represented by the July 3 proposal, we find it irrelevant whether the Machinists' negotiators were willing, or even authorized, during earlier bargaining to open the door to a flat rate system. Thus, contrary to our dissenting colleague, our finding that there was no impasse is not undermined by the Machinists' negotiators' tough statements suggesting "unyielding opposition" before they finally submitted a flat rate proposal. Those statements did not show that they would never yield, but merely that they would not yield quickly without a fight. For the same reason, contrary to the judge, we find irrelevant the General Counsel's failure to call Mike Day, a high-ranking Machinists official who, the judge found, would have had to authorize the negotiators to make such a concession. The fact is, the written proposal was submitted, and the Machinists never sought to retract it or claim that it was unauthorized. That the Machinists had never before been forced into making such a proposal when employers sought to bargain over flat rate compensation is, contrary to our dissenting colleague's apparent contention, similarly irrelevant.

We likewise disagree that what our dissenting colleague characterizes as the judge's "credibility" findings preclude our finding that the July 3 offer broke any deadlock that might have existed. The written proposal speaks for itself and cannot be minimized simply because the judge concluded that Boltuch was not "serious" in making a "vague oral proposal" during the June 30 negotiating session which preceded the session in which the written proposal incorporating a flat rate concept was offered. See *Island Creek Coal Co.*, 292 NLRB 480, 488–489 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990) (judge's conclusion that witness lied about reasons for information request not determinative in light of documentary and other undisputed evidence).

[11] Royal has not excepted to the judge's finding, despite its contention to the contrary, that Royal received the partial offer.

Detroit Newspaper Local 13 v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1979).[12] Rather than explore the possibilities raised by Machinists' July 3 offer, Royal rushed to declare impasse and implement its offer on July 5. Accordingly, we find that Royal's failure to respond to the partial offer precluded further exploration of possible tradeoffs and foreclosed any finding that good-faith bargaining exhausted the prospects of reaching an agreement.

Contrary to the judge and our dissenting colleague, we do not find that the Machinists' July 3 proposal somehow negated the concept of flat-time compensation by the inclusion of a binding dispute resolution mechanism for determining the time allocations on which flat rates would be based whenever there was a dispute—something which could occur when an industry manual did not clearly apply to a particular job or when the service manager determined that there were special circumstances requiring a different allocation. In fact, Royal's flat-time compensation proposal did not rely solely upon standard industry manuals, but reserved discretion in the service manager to substitute his own estimate of the time necessary to complete a job in circumstances where unanticipated or unusual difficulties arose. Moreover, the Machinists made clear they were not insisting on their proposal that the panel for making such decisions include two Machinists' representatives and one Royal representative. The offer indicated that if such a panel were not acceptable, then some "alternative" binding mechanism could be used; and the proposal was keyed to sections in Royal's own proposal (sec. 10) and did not state that industry manuals had no place in the overall rate-setting process. What our dissenting colleague castigates as something "too vague" to constitute "a good faith attempt at movement" was a clear indication of the Machinists' flexibility and an invitation to Royal to make a counterproposal so that the parties could explore the possibility of compromise on a system for resolving disputes over the time allocations that underlie a flat-rate system. Royal had never indicated that sole discretion of its service manager over the determination of time allocations was the linchpin of its proposal. Negotiating the details on such important subjects as wages is at the heart of collective bargaining.[13]

We note that the Machinists had not had sufficient time to analyze considerable information that they had received only shortly before Royal's declaration of impasse on July 3, when the Machinists made their partial offer on flat-rate compensation.[14] Royal's negotiator advised that Royal was still in the process of collecting information. The Machinists had made a 7-point information request concerning Royal's flat-rate compensation system, and they needed clarification of some of the responses Royal had made. (See, e.g., Tr. 1730–1749 and R-Exh. N-27-A, p. 818.) Contrary to the suggestion of our dissenting colleague, there was nothing frivolous about requests for information such as lists of tools. If the employees' compensation was going to depend on how quickly they could complete particular types of repairs, it was essential, for example, that they be provided the kinds of tools that would permit them to complete work quickly. Thus, a list of tools was clearly relevant to the flat-rate proposal. The Machinists also needed to know about employee classifications and how each would fit into the new system—how time allocations would be affected, for example, when several different classifications were involved in work on a badly wrecked car. Finally, we note that the Machinists had reason to obtain further information about another important issue, Royal's proposed flexible benefit plan, since they had not yet met and questioned a new plan administrator whom Royal had hired.

In sum, we find it clear that on July 3, with the submission of the Machinists' partial offer on flat-rate compensation and given the unresolved questions about how exactly the flat-rate system was likely to affect the unit employees, what had earlier seemed a deadlock was broken. It could not fairly be said, in the terms of *Taft Broadcasting*, supra, that the parties at that point had exhausted all possibilities of reaching agreement. Hence, Royal's declaration of impasse and implementation of its final proposal on July 5 was premature and violated Section 8(a)(5) and (1) of the Act for that reason.

b. Our finding that negotiations between Machinists and Royal had not reached a valid impasse finds further support in Royal's unfair labor practices away from the bargaining table. As discussed supra, we have found that

[12] Contrary to our dissenting colleague, we find nothing dilatory in the Machinists' bargaining over wages. The Machinists cannot properly be faulted for failing to present a complete proposal at the May 5 meeting, since it had been agreed that the purpose of that meeting was to establish the ground rules for their collective-bargaining negotiations. The Machinists presented their proposal at the first negotiating session on May 18, and Royal, which had already presented a proposal for sweeping changes in current wages and benefits at the May 5 session, presented a second proposal. Given the scope of the changes Royal was seeking, the Machinists can hardly be accused of undue delay simply because they did not capitulate immediately to the demand for a flat-rate basis for wages.

[13] Contrary to our dissenting colleague, we do not regard the profane outbursts by Machinists' negotiator Boltuch on July 3 as proof that the parties had not entered a new phase of negotiations in which compromise was possible. The Machinists were clearly not happy about having been forced into negotiating within the framework of a flat-rate system and the crudeness of Boltuch's language doubtless expressed that frustration. However, the judge himself indicated that he considered Boltuch's "ill advised profanity" irrelevant to his analysis of both the Royal/Machinist and the German/Machinists negotiations.

[14] The absence of a complaint allegation against Royal for refusal to provide information to the Machinists is immaterial to our finding that no genuine impasse existed**,** since that finding does not rest on such a refusal. Our point is not that Royal failed to furnish relevant information, but rather that it declared impasse before the Union had had adequate time to review and consider the information that it did provide. See *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985) (insufficient time between provision of requested information and declaration of impasse to warrant a finding that genuine impasse was reached).

Royal violated Section 8(a)(5) and (1) of the Act by virtue of Service Manager Chavez' direct dealing with employee Wong regarding flat-rate compensation, the very issue over which Royal has claimed, and the judge has found, the existence of impasse. When considered in the context of Chavez' role at the bargaining table, we conclude that Chavez' statements to Wong disparaged the collective-bargaining process and undermined the status of the Union at the bargaining table. *NLRB v. Walker Construction Co.*, 928 F.2d 695, 696–697 (5th Cir. 1991); *NLRB v. J.H. Bonck Co.*, 424 F.2d 634, 639 (5th Cir. 1970).

c. In sum, based on the totality of the circumstances we find that there was no impasse in fact**,** and that even if deadlock had been reached, no impasse could properly be declared because of the context of serious unremedied unfair labor practices. Accordingly, we find that Respondent Royal violated Section 8(a)(5) and (1) when it implemented portions of its final offer to the Machinists on July 5 in the absence of a bona fide impasse in bargaining.

D. Royal's Withdrawal of Recognition

On July 11, Royal withdrew recognition from the Machinists based on a petition signed by a majority of unit employees stating that they no longer desired union representation. The judge concluded that Royal had established an uncoerced loss of majority support for the Machinists. In the alternative, he found that Royal had established that at the time it withdrew recognition it had a good-faith doubt of the Union's majority status based on objective considerations.

We disagree. As explained above, we have reversed the judge's finding that Royal and Machinists had reached a genuine impasse in negotiations before July 5, when it implemented significant portions of its final offer. We have also found that that before July 10, the date on which unit employees signed the petition on which Royal relied to withdraw recognition, Service Manager Chavez had engaged in direct dealing and made several coercive statements to unit employees, including a suggestion to employee Williams that he sign a petition to get rid of the Union and a promise of a bonus if he would circulate it among other employees. Such unfair labor practices are clearly likely to undermine support for a union, and Royal thus could not lawfully rely on an antiunion petition signed in the context of such unremedied unfair labor practices. Given their character and timing, they clearly meet the Board's test in *Master Slack Corp.*, 271 NLRB 78, 84 (1984), for finding the petition tainted by the unfair labor practices.[15] See *NLRB v. Powell Electric Mfg. Co.*, 906 F.2d 1007, 1014 (5th Cir. 1990) (unilateral implementation of contract offer without valid impasse contributed to employee disaffection and tainted petition on which withdrawal was predicated); *Davies Medical Center*, 303 NLRB 195, 206-207 (1991), enfd. mem. 991 F.2d 803 (9th Cir. 1993) (unlawful to withdraw recognition on basis of antiunion petition tainted by supervisors' unlawful encouragement of signatures); *Toyota of San Francisco*, 280 NLRB 784, 804 (1986) (unremedied unfair labor practices, notably including bad-faith bargaining tactics, tainted antiunion petition and precluded lawful withdrawal of recognition).

Because, as we have found, employee disaffection from the Machinists, made manifest by the employee petition, resulted from Royal's unfair labor practices, Royal was not justified in relying on the employee petition to support its withdrawal of recognition from the Machinists. Accordingly, Royal's withdrawal of recognition from Machinists violated Section 8(a)(5) and (1) of the Act.

II. GERMAN/MACHINISTS NEGOTIATIONS (20–CA–23045)

A. German's Unfair Labor Practices Occurring Prior to Implementation of its Final Offer

1. Schmitt's Coercive Words and Conduct

We agree with the judge's findings, as modified below regarding dates, that German's vice president and general manager, Henry Schmitt, violated Section 8(a)(1) by engaging in a pattern of unlawful conduct to determine employee sentiment about bargaining proposals and by making coercive statements. Thus, on May 30, Schmitt told employee Francisco Torres that employees would be better off without "the third man," i.e., the Union.[16] About 2 weeks later in mid-June, Schmitt unlawfully told Torres that if he did not like to work at German he could find a union job elsewhere.[17]

We also agree with the judge that in late June Schmitt unlawfully asked employee Obo Help what he thought of

[15] In *Master Slack*, the Board identified the following factors for consideration:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effects on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

[16] The judge found that this conversation occurred in late June, but Torres' credited testimony clearly establishes the date to be May 30.

[17] Torres also credibly testified that on July 28, Schmitt told Torres that German would be operated on a nonunion basis. The judge placed the date "in July." We note that July 28 is after German's July 5 implementation. Thus, we find that this unlawful statement could not have affected the purported impasse.

Furthermore, although not mentioned by the judge, Torres testified that in August, 2 weeks before Torres quit in September, Schmitt approached him with a BMW hat in hand and said he would like to trade his BMW hat for Torres' union hat. When Torres would not trade, Schmitt told him that in order for employees to make more money and obtain a better retirement, the "third man," i.e., the Union, has to be out. We note that German did not attempt to withdraw recognition from the Machinists until December 8.

German's proposals.[18] At this time, Schmitt unlawfully told Help that he intended to get rid of the union pension plan and to substitute a 401(k) plan, and that Help could make more money under a flat-rate system of compensation.

2. German's pre-implementation unilateral change and/or direct dealing concerning employee parking

German posted a handwritten notice on a company bulletin board in late June or early July. This notice read: "Parking will be available free to *all* employees as of July 1 (day or night schedule)." (Emphasis added.) Credited employee testimony established that prior to German's July 3 lockout of the Machinists, employees were required to park their cars on the street. After the lockout, employees were allowed to park upstairs in German's facility, and when that became too crowded, German began to pay for indoor parking for employees at a nearby Holiday Inn.

Based on the handwritten notice and credited employee testimony, we agree with the judge that German unilaterally changed its employee parking policy in late June or early July by providing free parking to employees. German never discussed employee parking during bargaining, and this subject was not included in German's earlier offers to the Machinists. Therefore, the Machinists did not waive its right to bargain over the issue.

Alternatively, we agree with the judge that German dealt directly with unit employees by posting a handwritten notice addressed to all employees advising them that free parking would be available on July 1. Under either theory (unilateral change or direct dealing), we find a violation of Section 8(a)(5).[19]

3. The pre-implementation lockout

The amended complaint alleges that German violated Section 8(a)(5), (3), and (1) by locking out employees in the Machinists unit on July 3.

The judge found no antiunion or unlawful motive for German's 1-day lockout on July 3. Accordingly, he concluded that the lockout was lawful, irrespective of certain contractual provisions discussed below. In reaching this conclusion, the judge found, without specifying a precise date, that German and the Machinists were already at impasse prior to the lockout. Therefore, he found it unnecessary to determine whether a pre-impasse lockout was proper.[20] Alternatively, the judge found that the lockout was specifically authorized under a provision in each of the expired collective-bargaining agreements that precluded any change in terms and conditions of employment during negotiations for a successor agreement unless mutually agreed on, "or until negotiations are terminated by *economic action* of either party after . . . forty-eight hours written notice." (Emphasis added.) The judge found nothing unlawful in German's use of this contractual provision to justify a 1-day lockout in support of bargaining demands. Thus, the judge dismissed this allegation of the complaint.

The General Counsel and Charging Parties Painters and Machinists have excepted to the dismissal. For the reasons set forth below, we find merit in these exceptions.[21]

The Board has held, with judicial approval, that an employer violates Section 8(a)(5) and (1) of the Act when it locks out employees for the purpose of evading its duty to negotiate with their bargaining representative or compelling acceptance of its unfair labor practices. *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1078, 1085 (D. C. Cir 1991), and cases cited. An employer may also violate Section 8(a)(3) of the Act by locking out its employees, although such actions do not automatically run afoul of that provision. A "bargaining" lockout is permissible if its sole purpose is to bring economic pressure to bear in support of the employer's legitimate bargaining position. Id., citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Thus, in *American Ship Building*, the Supreme Court reversed the Board's finding of a discriminatory lockout because there was no evidence that the employer used the lockout "in the service of designs inimical to the process of collective bargaining," Id. at 308, or that "the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations." Id. at 313. See also *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

German contends that its lockout was lawful because it had a substantial business justification, i.e., it was necessitated by contractual provisions as a preliminary step to lawful implementation of its final proposals. We find no merit to this contention because, as explained below, the Union waived any such contractual requirement, and, more importantly, the lockout merely served as a preliminary step to an unlawful implementation, since, as

[18] Help testified that this conversation occurred a few days before, but less than a week before, the July 3 lockout of the Machinists by German.

The judge also found that in late June Schmitt told employee Obo Help that if he was no longer happy at German (because there was no union contract in effect) he could get a union job. Help's credited testimony, however, clearly places this conversation about a "month or two after the lockout" that occurred about July 3. We correct the judge's error and note that the later date makes sense as the contract did not expire until June 30. Accordingly, we have not relied on this conduct to support our finding of no lawful impasse.

[19] Member Brame agrees with his colleagues that the provision of free parking represented a unilateral change in terms and conditions of employment, and hence violated Sec. 8(a)(5). Accordingly, he finds it unnecessary to pass on the alternative theory that the Respondent also thereby engaged in direct dealing.

[20] As explained below in sec. II, B, 3, we reverse the judge's finding that German was at impasse with Machinists at the time of German's July 5 implementation.

[21] None of these parties briefed this issue to the Board.

shown in section B, infra, the parties were not at impasse and could not have been at impasse, given the context of serious unremedied unfair labor practices.

As to the alleged contractual requirement of "economic action" as a means of terminating negotiations prior to implementation of proposals, German acknowledges that on June 28, just prior to the contract expiration date, the Union offered to release German from any such contractual obligation. The Union was willing to waive any such requirement because it wanted to maintain the momentum of the parties' collective-bargaining negotiations. Despite that waiver, and even though the Respondent had no basis for certainty that the parties would shortly be at impasse, the Respondent locked the employees out simply in order to clear a path to implementation of its proposals. Thus, unlike the lockout in *American Ship Building Co.*, supra, which was designed as pressure to secure the union's agreement with the employer's legitimate bargaining position, this lockout was simply utilized to enable German to implement its own bargaining position without either the Union's agreement or a genuine impasse. In the language of *American Ship*, it was used "in the service of designs inimical to the process of collective bargaining." Id. at 308. Moreover, the hostility towards the Union expressed in the unlawful statements of Schmitt, German's vice president (discussed in sec. II-A-1 above), permits an inference that its conduct was also "actuated by a desire to discourage membership in the union." Id. at 313.

Accordingly, we find that German's lockout of its employees was unlawfully motivated and inconsistent with its duty to bargain in good faith. We thus find that German has thereby violated Section 8(a)(5), (3), and (1) of the Act. *D.C. Liquor Wholesalers*, supra; *Lane v. NLRB*, supra.

B. The German/Machinists Impasse Issue

1. The judge's finding of lawful impasse

The judge found that German had bargained to impasse with the Machinists for many of the same reasons that he relied on to find that Royal had bargained to impasse with the Machinists. The judge found that the parties had had adequate time to discuss the main issues and had failed to reach agreement and that the counterproposals made by Boltuch on behalf of the Machinists never dealt with the issue of flat-rate compensation. Specifically, he found that Boltuch's May 25 "Option 1" and "Option 2" proposals did not convey a willingness to bargain over the most important issues of flat-rate compensation and pension plans. The judge further observed that any concessions made by the Machinists were contingent on German's relinquishment of something that it wanted in the new contract.

The judge emphasized the major role that Mike Day, head of District Lodge 190, played in negotiations and stressed the importance of Day's June 14 statement that German was not really interested in flat rate and only wanted to provoke a labor dispute to bust the Union. This and similar statements attributed to the Machinists' representatives at the table, convinced the judge that Boltuch's June 30 statement—that the Machinists were then ready to bargain over flat rate—was mere posturing that could not be taken at face value.

Finally, the judge concluded that no nexus was shown between the impasse that he found had occurred sometime on or before July 3 and German's unfair labor practices.[22] Therefore, the judge concluded that German was privileged on July 5 to implement its final offer to the Machinists. We disagree. The basis for our disagreement lies in certain facts and developments which arose at the table on June 30 and July 3, which the judge did not address. We discuss these factual developments below and then analyze the impasse issue.

2. The June 30 and July 3 bargaining sessions

a. June 30

On June 30, early in the meeting, Machinists negotiator Boltuch announced that the Union was ready to bargain over flat-rate, subject to resolving certain collateral issues. Machinists' negotiator, Pam Allen, told German's chief spokesperson-attorney, Robert Hulteng, that the Machinists would agree to sign a flat-rate compensation plan if it was one that they could live with. First, however, Allen wanted answers to several information requests. Allen told Hulteng that the Machinists originally had opposed flat-rate compensation and wanted a contract without it, but having realized finally the importance of the issue to German, were now willing to discuss fully and explore German's proposal. Allen also told Hulteng that he should honestly admit that German was trying to thrust impasse on the table rather than reach agreement.

Hulteng responded that German would not move "one whit." He challenged the Machinists to introduce a better plan and stated, without substantiation, that German's plan worked so it should be accepted. The parties then discussed compensation under several flat-rate hypotheticals. Subsequently, the parties had a conference call with FMCS Mediator Jacobsen, who indicated her availability to assist the parties to discuss the issue on Monday, July 3.

When the Machinists asked German when its flat-rate proposal would be implemented if the Machinists agreed to it, German replied, within a year, probably sooner. Allen then made a flat-rate proposal designed to protect employees from discipline without access to grievance/arbitration for failure to meet the efficiency standards set forth in sections 10.1 and 10.2 of German's

[22] The pre-implementation unfair labor practices found by the judge consisted of coercive statements suggesting that employees should work elsewhere if they wanted union representation, direct dealing, and a unilateral change in conditions of employment.

final proposal. Allen also indicated that part of the Machinists' flat-rate proposal involved employee training. She asked what system German had in place to ensure that its technicians would receive the training needed to meet German's proposed efficiency levels. The parties caucused. On their return, German indicated the training that would be made available.

Allen, on behalf of the Machinists, then offered an oral proposal keyed to sections of German's proposal and resembling the one offered to Royal on July 3. There was a basic weekly pay guarantee based on a certain rate for a 40-hour week;[23] a three-person committee would meet weekly to to resolve disputes concerning dispatching, time allotments, and comebacks; training for all unit employees at BMW factory classes at German's expense; German's provision of a complete set of power tools for each employee at German's expense; a list of those power tools; and German's express agreement to fair and impartial dispatching.

Attorney Hulteng, on behalf of German, found nothing of value in the Machinists' flat-rate counterproposal. Hulteng called it regressive, and German stood firm on its final offer. German expressed the view that the Machinists had gutted the flat-rate concept by including a 40-hour guarantee at $24.50 per hour. The parties then scheduled a further meeting for Monday, July 3, and the Union reserved the right to return to the dealership to review voluminous flat-rate information that had been requested, and only received that day.

b. July 3

At the July 3 session, Machinists raised the issue of several information requests that it believed were outstanding. The Machinists asked for a computer printout regarding job-efficiency ratings for technicians, service writers, body shop employees, and the dispatcher, so the Machinists could fully assess the impact of German's discharge provisions on unit employees. German responded that this information was not available, but that it would double check. The Machinists also requested a copy of German's application for qualification of its 401(k) plan and for all other forms that were submitted to the IRS so the Union could assess employee participation information. When Allen asked if the IRS had issued a determination letter, German Attorney Elizabeth Franklin responded that she believed that it had. Machinists further indicated that its expert had reviewed copies of German's proposed health and welfare plan and had asked to meet with German's experts and that this request had not been honored yet.

Franklin asked for the Machinists' proposals, particularly those concerning flat rate. Allen responded that she had further questions about flat-rate compensation and needed clear answers first. The parties learned during a caucus that mediator Jacobsen would not be able to join them to discuss these issues. The Machinists then proposed language concerning section 10.1 (discharge or discipline for lack of efficiency) from a proposal that had been offered by the Machinists in an on-going negotiation between them and Diablo/Mazda Motors, another Bay Area employer that was represented by the same law firm that represented German. Franklin summarily rejected it.

Franklin again asked for a flat-rate proposal and characterized the Machinists' June 30 proposal as regressive. Allen responded that it was reasonable for the Union to ask for higher wages when German proposed taking away vacations. Franklin opined that if the Machinists were serious about flat-rate compensation then the Union would sign German's proposal. Machinists reiterated its position that, before it could make another proposal on flat rate, it needed German's responses to its flat-rate questions.

The parties again caucused. When they returned, German had responses to the Machinists' outstanding information requests. German attorney Justin Seamans indicated that he had spoken with Schmitt and had been informed that on June 29 German had given the Machinists a computerized printout of employee productivity for the most recent 120-day period.[24] Seamans stated that the rest of the information regarding employee efficiency was contained in raw data in the numerous file cabinets that had been picked up by the Machinists on Saturday, June 30. When Allen indicated that the Machinists needed the formula that German used to determine employee efficiency, Seamans indicated that he would find this out for them.

With regard to the IRS determination letter, German informed the Machinists that the letter had not been received because German's application had not been filed and therefore German's plan had not been qualified. German indicated that the first steps in the IRS approval process required that the employer sign up employees who would participate under the plan, and then submit a plan application. Thereafter, the IRS would issue a determination letter.

German indicated that it was still awaiting the first step in the overall process, i.e., signing up employees for the plan. Seamans stated that he was not sure whether Ger-

[23] Contrary to our dissenting colleague, we do not view the guarantee as a gutting of the system. Although calculated on what an employee would earn at a certain hourly rate for a 40-hour rate, it still operated simply as an overall "floor" for total pay. To be sure, the Machinists started with a high figure that German was most unlikely to agree to, but the Machinists did not state that the figure was nonnegotiable, and good-faith bargaining might have arrived at some pay guarantee between this proposal and what German would be required to pay under minimum wage laws. The flat-rate system could still be applied, but the weekly total paid to an employee would be increased if it fell beneath the floor.

[24] A computer program determined employee efficiency for the most recent 120-day period. Otherwise, the efficiency ratings had to be done manually.

man had a form available to sign up employees in the plan. Seamans acknowledged that German's plan was incomplete regarding employee participation and that German could not send its application to the IRS before it had determined employee participation.

The Machinists then pointed out that Franklin had given them inconsistent information about this issue earlier that day. Machinists Attorney Allen also expressed a contrary view. She stated, based on her experience, that an application could be filed with the IRS prior to a determination of employee participation. German then asked for a caucus.

When the parties returned, Franklin asked for counterproposals. In response, Allen indicated that the Machinists had further questions and that Franklin had attempted to obstruct the Machinists' efforts to obtain clear answers. Allen asked for a deal—30 minutes to ask questions before giving a proposal. Franklin agreed to consider it.

The Machinists then asked questions about discipline or discharge for less than 100 percent efficiency under section 10.1 of German's proposal. The Machinists highlighted areas of concern with reference to the computer printout that covered the period of January through April 1989. German confirmed that if a computational error was made concerning employee efficiency, the discipline would not be grievable. The Machinists then gave German a proposal for grievance arbitration and the selection of an arbitrator which was the same as a proposal that Royal had given the Machinists. Franklin agreed to consider this proposal at the next caucus. Franklin then asked whether the Machinists would accept German's proposal on section 10 if German agreed to insert the Machinists' proposed language for selection of an arbitrator. Allen responded that the Machinists would be "a lot closer to agreeing."

Franklin then asked if the Machinists were willing to accept German's flat-rate proposal. Allen responded, "Not as is." Franklin then stated that German did not foresee any further movement to be made, particularly in its flat-rate proposal set forth in section 13 of its proposed contract. Franklin asked whether the Machinists had any proposals regarding section 13. Allen responded that section 13 became more palatable as German moved on other areas of the contract or at least considered movement.

Franklin responded that she had agreed to consider language regarding selection of an arbitrator, but that German was unlikely to even consider any further changes. Franklin reiterated that Allen had confirmed that the Machinists would not accept German's flat-rate proposal as is, and that German would not accept anything less than the flat-rate proposal currently on the table. Franklin confirmed that German would not move higher on flat-rate hourly wages. Allen referred to the Machinists' June 30 proposal and stated, "There is potential for better wage under flat rate but no guarantee."

Franklin then asked whether the Union was willing right then and there to agree to language contained in German's July 3 final offer. Allen responded that the Machinists had more questions before answering yes or no, and that despite statements made at the table, the Machinists had not had sufficient time to explore fully German's proposal. Allen then asked for the factors used in making assignments under the hourly compensation system. Franklin responded that the factors were listed in the proposal and had been used to make current assignments. She again stated that German would not increase wages under either its flat-rate or its hourly offer.

Allen then indicated that the Machinists had been supplied with a list of tools. Allen stated that as part of the Machinists' flat-rate proposal it wanted to make some proposals regarding the assignment of power tools as opposed to manual tools.

The parties then caucused. When they reconvened, Franklin asked whether the Union had any more proposals. Allen reminded Franklin that German had agreed to consider the Machinists' language proposal concerning the selection of an arbitrator. Franklin rejected it. She stated that German was at final position, that there would be no more movement, and that the arbitration language was the same as had existed in the expired contract and there was no reason to change it. Franklin again asked for the Machinists' proposals on flat rate. Allen questioned why German wanted the Machinists' flat-rate proposals, if they were at final position. She also asked whether German enjoyed seeing Machinists "twist in the wind."

Franklin then stated that German was unwilling to sit and wait for proposals any longer. She said that it was obvious to German from previous statements made by Machinists representatives Day and Martin that the Machinists would never accept flat-rate compensation, and from statements made by Allen that day that the Machinists would not accept German's flat-rate proposal as is. Allen responded, "Until we get some answers to our questions. You refuse to answer questions." Franklin then stated that German saw no reason to continue meeting. She asked that any further questions be put in writing, and she stated that she was leaving.

Allen responded that the Machinists were prepared to stay all night. She opined that Franklin had exhibited some civility and seemed to try genuinely to answer the Machinists' questions, and that the Machinists believed that it would be productive to continue the discourse. Franklin reaffirmed German's belief—based on prior statements from the Machinist's representatives, the Machinists' June 30 proposal, and Allen's failure to make a flat-rate proposal that day—that the Machinists were not, have never been, and never will be interested in German's flat-rate proposal. When Allen asked whether

German was going to put the flat-rate system in effect on Wednesday, Franklin responded that German would let the Machinists know what compensation would be in effect.

Thereafter, on Wednesday, July 5, German implemented its final proposal.

3. Analysis

We agree with the General Counsel that German failed to meet its "heavy" burden of of showing that it had reached a genuine impasse in its negotiations with the Machinists prior to its July 5 implementation, i.e., that good-faith negotiations had exhausted the prospects of reaching an agreement As explained below, for two independent reasons German failed to make this showing: first, the parties had not reached the point at which further movement in bargaining positions was unlikely; and second, unfair labor practices committed by German vitiated any claim that it had reached a genuine impasse.

a. In our view, the judge's conclusion that impasse was reached reflected insufficient consideration of some of the record evidence and the assignment of undue weight to opinions expressed by Mike Day at the June 14 bargaining session at which German introduced several new proposals.[25] We find that Day's remarks merely indicated that the Machinists could not accept German's flat-rate proposal with all the other take-aways on the table.[26] We further find that the Machinists' June 30 proposal on flat rate, and the exchange between negotiators at the table on July 3, demonstrate that the Machinists were not unalterably opposed to a flat-rate system of compensation and that the parties were not yet at impasse over the issue. *Taft Broadcasting*, supra; *Hi-Way Billboards*, supra.

Although German was firmly adhering to its position,[27] the Machinists' position at the last two bargaining sessions remained fluid, and they were willing to move from their position in an effort to reach agreement. In fact, the record shows that for all the parties' posturing, progress was being made at virtually every session, albeit slowly. On July 3, German made minor language changes in response to Machinists' requests at the table on June 30. The Union had made a counteroffer on flat rate on June 30, thereby showing a genuine desire to bargain over flat rate. When this counteroffer was rejected, the Union again reserved the right to return to the dealership and review technical information concerning flat rate that had been requested that day. Contrary to our dissenting colleague, we see nothing frivolous in the Machinists' request at the June 30 negotiating session to have access to "filing cabinets full of copies of past work orders." The flat-rate system was based on the particular kinds of jobs done and would involve assigning a fixed time allotment to each job. The work orders would allow the Machinists to determine how much time had been taken in the past for particular jobs, and they could calculate the difference between what employees had been paid and what they would be paid under the system German was proposing.[28] The Machinists clearly indicated on July 3 that they would submit a detailed flat-rate proposal after German gave responses to their flat rate inquiries. In these circumstances, we agree with the General Counsel that flat-rate compensation had not been exhaustively discussed by July 5.

At the July 3 meeting, the parties had not exhausted mediation services that had been offered on the flat-rate issue since the mediator had become unavailable that day. Furthermore, the Machinists had made clear that they needed more time to analyze the voluminous records that they had picked up on June 30 at German's dealership before they could submit a detailed flat-rate proposal.[29] In fact, review of German's bargaining notes for July 3 establishes that it was not until late in the day, after the parties returned from caucusing at 4:05 p.m., that German fully explained to the Machinists how the

[25] At the June 14 bargaining session, German presented a third proposal (R. Exh. P-3). German offered either hourly or flat rate wages for mechanics, and hourly commission wages for service writers. German could not yet tell the Machinists where the mechanics would be slotted in the various wage levels that German had proposed. German also introduced a flexible benefit plan, contrary to Franklin's May 31 representation that German would not be proposing a flexible benefits plan. Also on June 14, German introduced an inchoate 401(k) profit-sharing plan in lieu of its prior proposal that German could choose and implement a profit-sharing plan after giving notice to the Union.

[26] We find that Day's June 14 declarations amounted to little more than bargaining table strategy or rhetoric. This observation is borne out by the Machinists' June 30 proposal, which contained a flat rate proposal. See *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 fn. 6 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991) (discounting significance of union declarations of intent to "recapture" earlier concessions").

[27] Respondents' attorney Hulteng testified that he entered negotiations with very strong doubts that the Machinists would accept a flat-rate proposal. Although it is not entirely free from doubt, given Hulteng's assistance in the formulation of German's bargaining proposals and strategy, we find the record insufficient to establish that German formulated its flat rate demand specifically to avoid its obligation to bargain in good faith. Cf. *D.C. Liquor Wholesalers*, supra (employer's last-minute wage cut demand formulated "to avoid obligation to bargain"). The instant case was not litigated on this theory.

[28] Given the relevance of the information requests and the importance of the subject—wages—to which they related, we do not agree with our dissenting colleague that the judge's crediting of testimony that the negotiators were laughing when they made the information requests shows the requests to be merely dilatory tactics. In the stress of negotiations many different kinds of emotions—even some seemingly inappropriate—may be expressed. We also note that, as in the case of the Royal negotiations, there was nothing dilatory in the Machinists' failure to present a contract proposal at the first meeting, called to set ground rules for bargaining. The Machinists had submitted their initial contract proposal at the first negotiating session, on May 16.

[29] The foregoing factual discussion also shows that the Machinists needed more time to determine what employees would be subject to discipline under German's outstanding proposal based on past failure to meet current efficiency standards. German did not tell the Machinists that its implemented offer would not include its proposal for discipline and discharge for lack of efficiency.

Union could glean the requested information concerning flat-rate compensation from the prodigious amount of raw data that German had provided. (R. Exh. N-35A at 1865–1867.) We conclude that on July 3, the Machinists had not possessed this flat-rate information for a sufficient period of time to enable it to fully understand the critical impact that German's proposed flat-rate system of compensation would have on unit employees, or to make its best flat-rate offer, in light of German's intransigence.[30]

Since German's last offer was implemented at a time when the Machinists were still genuinely considering German's proposals on economic items in a new contract, we conclude that implementation occurred before there was an impasse in bargaining. *Dependable Maintenance Co.*, 274 NLRB 216 (1985). In fact, the Machinists indicated that they would be "a lot closer" to agreement on German's proposal concerning discipline for lack of efficiency, a proposal closely tied to flat-rate compensation, if German agreed to the Machinists' proposal (that had been accepted by Royal) concerning selection of an arbitrator. German had agreed to consider the Machinists' proposal on July 3, thereby suggesting there was room for further movement. Although the Machinists stated that they were not willing to accept German's flat-rate proposal "as is," the Machinists indicated that German's flat-rate proposal became more palatable as German moved on other areas or at least considered movement on other areas.[31]

The Machinists then indicated that as part of their flat-rate proposal they wanted to make some proposals concerning power tools. In essence, German then stated that its flat-rate proposal was the one it wanted, take it or leave it. The Machinists responded that they had more questions before answering yes or no. German then indicated that it was "unwilling to sit here and wait for proposals any longer." In these circumstances, particularly in light of the fact that the Union did not have critical flat-rate information for a sufficient period of time, we conclude that German acted prematurely when implementing its final offer and did not place its theory of the Machinists' bargaining rigidity about flat rate to the test. *Dependable Maintenance Co.*, supra, 274 NLRB at 219.

In addition to flat-rate compensation, we conclude that other important issues in the negotiations had not been exhaustively discussed by July 5. For example, German's 401(k) plan, first proposed on June 14, was inchoate. In fact, at the July 3 meeting, German's attorney, Seamans, acknowledged that the plan was incomplete with respect to employee participation issues. German did not bargain with the Machinists about employee participation issues. Rather, as further explained below, on July 15 German dealt directly with employees in the Machinists bargaining unit concerning employee participation in German's fringe benefit package, including its 401(k) plan, after it implemented its final proposal on July 5.[32]

In addition, it was not until June 28 that the Machinists learned that the designated administrator of German's health insurance plan, Larry Lipman, had resigned. In these circumstances, there was insufficient opportunity to discuss and explore the issue of health benefits plan administration, an important mandatory subject of bargaining, between the time of Lipman's withdrawal in late June and the implementation of German's offer on July 5. Similarly, the meeting requested by the Union with German's benefit experts—specifically a meeting with Joyce Kincaid regarding the "non-union" NCMCDA plan—had not occurred as of the July 3 meeting and was not held until late July.[33]

b. Even if, contrary to our finding above, the parties had reached a point at which no further movement was possible, German's prior commission of certain unfair labor practices would preclude our finding a genuine impasse, privileging unilateral implementation of German's offer. *Noel Corp*., supra, 315 NLRB at 911 fn. 33; *Great Southern Fire Protection,* supra. Schmidt's suggestion to employee Torres about finding a union job elsewhere signaled that German was somehow contemplating a workplace free of any union. Schmidt's unlawful remarks to employee Help about replacing the Union pension plan with a 401(k) plan and German's notice to all its employees that it was offering them free parking—a benefit they had never enjoyed before and that was not being offered to the Machinists at the bargaining table—clearly undermined the Machinists' position as a bargaining representative. We therefore conclude that any impasse was tainted by these instances of bad-faith conduct towards the employee bargaining representative

[30] Thus, while we agree with the judge's dismissal of the 8(a)(5) complaint allegation regarding German's failure to provide relevant information to the Machinists, we find that the Machinists had insufficient time to digest and fully analyze this flat rate data prior to German's July 5 implementation. This factor supports our finding that no good-faith impasse existed prior to German's implementation.

[31] The very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues, which have not been the subject of agreement or disagreement, may result in agreement on stalled issues. "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Thus, had German "been willing to bargain further, much more might have been accomplished through the give and take atmosphere of the bargaining table." *NLRB v. Sharon Hats, Inc.*, 289 F.2d 628, 632 (5th Cir. 1961).

[32] We note that this direct dealing with the Machinists' unit regarding benefits, unlike the direct dealing regarding employee parking discussed above, occurred after German's July 5 implementation of its final offer to Machinists and therefore does not directly support our finding of no lawful impasse. Rather, we rely on German's failure to bargain regarding employee participation in fringe benefits to support our no-impasse finding.

[33] R. Exh. N-35A at 860–861.

C. German's Post-Implementation Direct Dealing

The complaint in Case 20–CA–23045 alleged that on or about July 15 German bypassed the Machinists Union and dealt directly with employees in the Machinists unit. Specifically, German is alleged to have distributed copies of a new fringe benefit package, including a 401(k) profit-sharing program, to all employees, and to have told unit employees that they must enroll in such benefit programs by July 20 or waive their rights to participate. The judge failed to make a specific finding regarding these allegations, although he did find merit in a similar direct-dealing allegation in the German/Teamsters case, Case 20–CA–23048.

As set forth above at fn. 4, we have adopted the judge's findings concerning the German/Teamsters negotiations in Case 20–CA–23048, including his finding that German's sponsorship of informational meetings between benefit plan administrator Gene Adams & Associates and employees represented by the Teamsters constituted direct dealing in violation of Section 8(a)(5). We similarly find that German unlawfully dealt directly with the Machinists' unit by sponsoring mid-July benefit meetings between Gene Adams & Associates and the employees represented by the Machinists.

D. German's Unlawful Withdrawal of Recognition from the Machinists

On December 8, German withdrew recognition from the Machinists based on a petition signed by a majority of unit employees stating that they no longer desired union representation. The judge concluded, and we agree, that German thereby violated Section 8(a)(5) of the Act.

As set forth above, we have found, in agreement with the judge, that Respondent German violated Section 8(a)(1) of the Act by engaging in a pattern of coercive statements and attempts to determine employees' union sentiments; and violated Section 8(a)(5) and (1) by making unilateral changes in employees' terms and conditions of employment and dealing directly with employees. We have also found, contrary to the judge, that German further violated Section 8(a)(5) and (1) of the Act by locking out employees, prematurely declaring impasse, and implementing its final offer on July 5.

We agree with the judge that, in light of Respondent German's unremedied unfair labor practices, it was not privileged to rely on the employee petition for its withdrawal of recognition from the Machinists. We find that employee disaffection from the Union and the resulting petition were the foreseeable consequence of German's unfair labor practices. In this regard, we note that the judge concluded that Schmidt's unlawful comments and the direct dealing regarding the parking privileges were by themselves enough to taint the petition. As set out above, we have further found that German unlawfully locked out its employees and, in the absence of genuine impasse, implemented a contract offer which dramatically affected the unit employees' wages and working conditions. The latter unfair labor practice, in particular, would operate as a continuing reminder of Respondent German's power to override the wishes of the employees, speaking through their bargaining representative, on the central issue of wages. The evidence establishes a sufficient nexus between the unfair labor practices and the expression of employee disaffection in the petition to warrant a finding that the petition was tainted and Respondent German's withdrawal of recognition accordingly a violation of Section 8(a)(5) and (1). See, e.g., *NLRB v. Powell Electrical Mfg.*, supra, 906 F.2d at 1014; *Davies Medical Center*, supra, 303 NLRB at 206–207; *Toyota of San Francisco*, supra, 280 NLRB at 804; *Master Slack Corp.*, supra, 271 NLRB at 84. The appropriate remedy for an unlawful withdrawal of recognition is a bargaining order. *Henry Bierce Co.*, 328 NLRB No. 85, slip op. at 6–7 (1999); *Caterair International*, 322 NLRB 64 (1996). Accordingly, we affirm the judge's finding that German violated Section 8(a)(5) of the Act by withdrawing recognition from Machinists on December 8.

III. GERMAN/PAINTERS NEGOTIATIONS (20–CA–23064)

A. The Impasse Issue

1. The judge's finding of lawful impasse

The judge concluded that German and the Painters were at impasse on flat-rate compensation when German implemented its final offer on July 5. Alternatively, he found that the Painters had stymied effective negotiations by engaging in "dilatory tactics and nonserious bargaining."

Next the judge analyzed impasse factors under *Taft Broadcasting*, supra. The judge counted six bargaining sessions. He reasoned that confusion was created by the Painters' representation by various negotiators (first Boltuch, then Van Zevern, then David Rosenfeld), and especially by the 11th hour debut of Rosenfeld at the last bargaining session on June 29. The judge found that these tactics contributed to the parties' failure to reach agreement. The judge discredited Rosenfeld's expressions of flexibility, finding that the Painters had never presented any concrete evidence of a willingness to embrace German's proposals, particularly German's flat-rate proposal. In addition, the judge stressed that on June 29, Rosenfeld failed to offer, or even define, a flat-rate proposal that the Painters would find acceptable. The judge found that the Painters' July 5 flat-rate offer—received by German on July 7 after its July 5 implementation—was so at odds with what German wanted that arguably it could not be considered a flat-rate proposal at all.

The judge also underscored what he found to be other evidence of the Painters' "delay . . . and obfuscation," including apparently conflicting statements regarding the Painters' position on flat rate by Van Zevern on June 20 and on June 29 by Rosenfeld. Finally, the judge empha-

sized Rosenfeld's failure, on June 29, to agree to Hulteng's offer to engage in further negotiations on July 1–4, even though Hulteng told Rosenfeld that German was planning to implement its final offer on July 5.

2. Discussion and analysis

Contrary to the judge, we find that German has not met its burden of showing that important issues in negotiations, particularly flat-rate compensation, had been exhaustively discussed by July 5, or that the Union precluded effective negotiations by dilatory tactics and nonserious bargaining.

Based on our review of the June 29 bargaining session, we reverse the judge's finding that attorney Rosenfeld's 11th hour debut contributed to the failure of the parties to reach agreement.[34] The record evidence concerning the June 29 bargaining session demonstrates that Rosenfeld was familiar with the issues and fully prepared to bargain. In the circumstances of this case, we find that Rosenfeld's entry into negotiations signified that the Union was, in fact, actively seeking agreement and was flexible in its bargaining positions.

On June 29, Rosenfeld offered to waive language in the expiring contract that required economic action before unilateral changes could be made. He vigorously disputed the existence of an impasse. Rosenfeld also expressed a desire to include a flat-rate provision in any agreement reached. In fact, Rosenfeld stated that he would submit a substantial flat-rate proposal by July 5.

By letter dated July 5, Rosenfeld fulfilled his pledge by submitting a substantial flat-rate proposal. This proposal provided as follows: (1) the base labor rate shall be increased 75 cents per hour on each anniversary date for a 3-year contract; (2) flat-rate hours will be based on the Mitchell Manuals; (3) come-backs shall not include work which is not included in time estimates according to the Mitchell Manuals; (4) come-backs shall be subject to the grievance procedure; and (5) the Employer shall have the right to pay anyone above the minimums established.

Contrary to the judge, we find this proposal to be "concrete evidence" of the Painters' willingness to accept flat-rate compensation. Objectively viewed, this proposal demonstrated flexibility and significant movement, provided a basis for further progress, and strongly indicated that the parties were not yet completely deadlocked. *Francis J. Fisher, Inc.*, 289 NLRB 815, 821 (1988).[35]

Given this clear indication of the Union's flexibility on the major issue in negotiations, German "might reasonably be required to recognize that negotiating sessions might produce other or more extended concessions. This is the purpose of collective bargaining." *NLRB v. Webb Furniture Corp.,* 366 F.2d 314, 316 (4th Cir. 1966), enfd. 152 NLRB 1526 (1965). As noted previously, the very nature of collective bargaining presumes that, while movement may be slow on some issues, a full discussion of other issues, which have not been the subject of agreement or disagreement, may result in agreement on stalled issues. "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Thus, had German "been willing to bargain further, much more might have been accomplished through the give and take atmosphere of the bargaining table." *NLRB v. Sharon Hats, Inc.*, 289 F.2d 628, 632 (5th Cir. 1961).

Contrary to the judge, we do not find that the Painters engaged in delay and obfuscation between June 20 and July 5.[36] Examination of the circumstances surrounding the June 20 bargaining session reveals that Van Zevern was justified in attempting to persuade German to back off its flat-rate proposal based on the fact that German's managers were saying it would not work. (R. Exh. N-25A at 517.) After Van Zevern conveyed his opinion to German that "the guys will reject flat rate," Van Zevern was successful in securing German's agreement to change its flat-rate proposal to permit fairness in dispatching and grievances over job assignments. Id. at 523. It was in this context that German initially indicated that this was the bottom line, and Van Zevern indicated that he could not sign the flat-rate proposal on the table.

Further, Rosenfeld indicated that there were several reasons why the Painters did not offer a flat-rate proposal on June 29. He testified that by June 29 it had become clear that the Painters would either have to accept some form of flat rate or there would be a labor dispute. According to Rosenfeld, the Painters decided to "blink" and

[34] In neither of the cases cited by the judge, *Louisiana Dock Co.*, 293 NLRB 233, 235 (1989), reversed in part 909 F.2d 281 (7th Cir. 1990), or *AAA Motor Lines*, 215 NLRB 793, 794 (1974), was the entry of a new negotiator after some meetings had occurred a factor in determining whether impasse had been arrived at. In *Louisiana Dock*, the union rejected the employer's offers to bargain by insisting on negotiations only in an inappropriate unit. In that context, the Board held that the union's own acts foreclosed effective negotiations and privileged respondent's unilateral actions. In *AAA Motor Lines*, the union's refusal to meet and bargain over the terms of a new contract justified certain unilateral changes. Thus, neither case is apposite here.

[35] As in the case of the Machinists, we disagree with our dissenting colleague that the judge made any "credibility" findings incompatible with our conclusion. It is undisputed that the Painters had announced before July 5 that they would submit a flat rate proposal, and it is clear that the written proposal mailed to German on July 5 was consistent with that promise. We also note that the reference to a "base labor rate" in the Painters' proposal was in no way inconsistent with German's proposed flat rate system. Under German's proposal, there would not only be fixed time allocations for types of jobs, but the employees would be broken into different classifications with a different hourly rate of pay for each group.

[36] Contrary to our dissenting colleague, the Painters also did not engage in dilatory tactics at the outset of negotiations. They presented their first contract proposal at the first negotiating session after the ground rules meeting.

"take flat rate," and Rosenfeld agreed to make a substantive proposal. He testified that he did not make it on June 29 because German had pointed to no economic exigency other than its own internal deadline that compelled receipt of a flat-rate proposal from the Painters by late on Thursday, June 29, just before the long July 4 holiday weekend. He also testified that he wanted to let Van Zevern have a chance to let the word filter out, since previously the membership had understood that a flat-rate proposal would not be forthcoming.[37]

Finally, we note that, at the outset of the June 29 bargaining meeting, Rosenfeld reminded Hulteng that the parties were not at impasse in light of the Painters' outstanding information requests concerning health and welfare and pension issues (discussed below) and his offer to make a substantial flat-rate proposal. In fact, Rosenfeld testified that he was surprised when he received Hulteng's June 30 letter stating that German intended to implement on July 5. Cf. *D.C. Liquor Wholesalers*, supra (one party's willingness to move further toward agreement and its protestations that negotiations have not reached impasse provide substantial evidence to support the Board's finding of no impasse). In light of the foregoing, we find the Painters' bargaining stance to be entirely understandable, particularly in light of the fact that Hulteng ended the June 29 meeting by stating that "flat rate is available—I hope you reconsider," thereby suggesting that the parties were not at impasse because a flat-rate proposal would be entertained. (R. Exh. N-32A at 754.)

In sum, we find that German's July 5 implementation prior to any discussion of the Painters' July 5 flat-rate counterproposal, that German indisputably knew was coming, prematurely foreclosed further bargaining on flat-rate issues before all prospects for reaching agreement were exhausted. Because German never fully tested the bona fides of the Painters' bargaining position on flat rate, we find that a bargaining impasse did not occur at the time of German's July 5 implementation. In these circumstances, we conclude that when German implemented its final offer on July 5, negotiations had not reached the point where there was "no realistic possibility that continuation of discussion at that time would have been fruitful." *Television Artists, AFTRA (Taft Broadcasting Co.) v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

Our conclusion finds further support in the fact that the Painters were given insufficient time, prior to German's July 5 implementation, to analyze information that only recently had been requested concerning critical issues in negotiations. At the end of the June 29 meeting, German had agreed to accommodate the Painters' request to visit German's dealership on July 3 to review repair orders and timecards, estimates on employee efficiency, and information on come-backs from January 1, 1987, through that time.[38] Rosenfeld indicated that the Painters' ability to evaluate or accept German's flat-rate proposal depended upon receipt of this data.[39] Rosenfeld also indicated that the Painters needed the information to formulate its own flat-rate proposal, which would be ready by the close of business on July 5.

We also find that the Painters had insufficient opportunity to discuss and explore other information requests made by the Painters on June 29 regarding German's proposed health benefits proposal. See *Dependable Maintenance Co.,* 274 NLRB 216, 219 (1985) (insufficient time between provision of requested information and declaration of impasse to warrant a finding that genuine impasse was reached). For example, Rosenfeld requested information necessary to ensure that the proposal complied with Section 89 of the Internal Revenue Code.[40] He requested that German provide a complete copy of its health benefits plan to the Painters. There also had been insufficient opportunity for the Painters to discuss and explore issues concerning German's administration of its health insurance plan after Lipman's withdrawal as administrator on June 28. Rosenfeld specifically requested a meeting with German's new plan administrator:[41]

> [I]t's important to interview and talk to administrators. The burden is on you to set up a meeting and you haven't complied. We want to find out how they administer the plan? Liberal or conservative? Until the review process is completed, we can't intelligently accept or reject your proposals.

Rosenfeld also requested the name of a contact at the administrator's broker's office. He also wanted to ascertain the individual responsible for administering the claims for this plan and the average time to process claims. Rosenfeld assured German that these were legitimate requests for relevant information and that the Painters would review the information without delay.[42]

The record, viewed in the light most favorable to German, shows that, at best, German delivered the requested information but did not allow adequate time for review by the Painters before it implemented its final offer. In these circumstances, it is impossible to determine the effect of the information on the progress of the parties' negotiations. (See Tr. at 1605.) This uncertainty must be resolved against German, whose precipitous actions

[37] Contrary to the judge, we find that Rosenfeld's testimony that he had no personal knowledge of whether Van Zevern did so to be immaterial.

[38] See R. Exh. N-32A at 752–754, 761–763; R. Exh. N-32 at 1330.

[39] R. Exh. N-32A at 752, 762.

[40] R. Exh. N-32A at 756.

[41] Rosenfeld opined that Lipman was a good administrator and if he was not there, the Painters wanted to talk to the new administrator. R. Exh. N-32A at 763.

[42] R. Exh. N-32A at 759.

created it. *Dependable Maintenance Co.*, supra, 274 NLRB at 219. This evidence, together with the evidence discussed above concerning the prospects on July 5 for movement in the negotiations, warrants the conclusion that the parties were not at impasse on July 5, when German implemented its final offer.[43]

B. German's Unlawful Withdrawal of Recognition from Painters

On December 15, less than 6 months after Respondent German had unlawfully implemented its contract proposal, most notably its flat-rate wage proposal, it withdrew recognition from the Painters on the basis of an employee petition.[44] For reasons similar to those on which we concluded that the Respondent violated the Act in withdrawing recognition from the Machinists (sec. II-D, above), we find that this withdrawal of recognition was based on a tainted petition and accordingly unlawful.

IV. HONDA/TEAMSTERS NEGOTIATIONS (CASE 20–CA–23049)

A. The Impasse Issue

1. The judge's finding of lawful impasse

The judge concluded that Honda reached lawful impasse with the Teamsters on August 7. Therefore, the judge dismissed allegations that Honda violated Section 8(a)(5) by implementing its last offer to the Teamsters on August 9. He also dismissed "derivative allegations" that the employees in the Teamsters unit were unlawfully locked out on August 8 and that the August 22 strikers were unfair labor practice strikers.[45] Accordingly, the judge dismissed all complaint allegations concerning Honda and the Teamsters.

The judge found that Honda and the Teamsters had five bargaining sessions (May 24, June 8 and 16, July 14, and August 7). The parties had agreed to a hiatus in bargaining from mid-June to mid-July. On June 27, these parties agreed to extend the extant agreement for an additional month and Honda agreed to redraft some proposals. The judge credited Honda attorney Hulteng's denials that he had informed Teamsters' attorney, Boltuch, during a June 27 telephone conversation that Honda would withdraw Honda's pension plan (the "Boas plan") and Honda's health and welfare proposal, and that Honda would put the Teamsters' Taft-Hartley benefit plans back on the table when the parties resumed bargaining after the hiatus.[46] Accordingly, the judge concluded that no credible reason was given for the Teamsters' failure to meet or attempt to meet with Wyatt & Company (the pension plan administrator) to obtain information regarding the Boas pension plan during the hiatus in bargaining from mid-June to mid-July.

The judge found that Boltuch's August 7 agreement to accept the concept of commission compensation for parts-employees was "illusory" because it was made at the "11th hour" and because no concrete counterproposal had been tendered. The judge also noted that Honda's general manager, William Boggs, testified that the parties were far apart at the August 7 meeting and that he had concluded that agreement was not possible.

In addition, the judge found that the "eviction" of Honda's representatives from the negotiating venue on August 7 was suspect and could have been easily prevented by Teamsters.[47] Finally, the judge emphasized that the Teamsters' concessions were conditioned on trade-offs for other issues that Honda was entitled to insist on such as pensions, wages (commissions), and health and welfare. In sum, the judge found that by August 7, the prospects for reaching agreement had been exhausted and Honda and Teamsters were at impasse.

2. Discussion and analysis

In our view, the judge erred in finding that impasse had been reached after the second meeting following the June 16-July 14 hiatus in bargaining. This hiatus was granted pursuant to Honda's June 27 request to extend the Machinists' and the two Teamsters' contracts to July 31 so that Honda's new manager could "get up to speed" and Honda could reformulate certain proposals. Prior to the hiatus, the parties bargained on only three brief occasions (May 24, June 8 and 16).

Because Honda had proposed extensive contract changes, the Teamsters had made numerous requests for information pertaining to the many issues in negotiations,

[43] Because we find no prior serious unremedied unfair labor practices directed at the Painters, we reject the General Counsel's contention that impasse was precluded even had the parties been genuinely deadlocked.

[44] See R. Exh. C-269.

[45] On August 8, Honda had locked out employees in the Teamsters' bargaining units. The complaint alleges that the lockout resulted from an antiunion motive. On August 9, Honda wrote the Teamsters and stated that Honda would not move from its July 19 final offer that had been rejected by the Teamsters. Honda stated that it was implementing this final offer, except for union security, grievance and arbitration, and contract-term proposals. The Teamsters struck Honda on August 22. The judge failed to mention that the General Counsel had withdrawn the complaint allegation that employees represented by the Teamsters struck Honda on August 22 and were unfair labor practice strikers. Accordingly, we do not pass on whether these strikers were unfair labor practice strikers.

[46] Based on the wording of Boltuch's June 29 letter to Hulteng, the judge was convinced that Boltuch was mistaken regarding Hulteng's alleged statements about the withdrawal of the Boas pension plan and the proposed health and welfare plan. Thus, he credited Hulteng's denials about that portion of the telephone conversation.

[47] At the August 7 meeting held at the Engineers and Scientists Hall in San Francisco, Franklin had insisted on receiving the Teamsters' wage offer for parts-unit employees. Boltuch had insisted on giving a full counteroffer on each section of Honda's final proposal. Boltuch claims that Franklin left the August 7 meeting at 3:10 p.m. before he could make counterproposals on health and welfare and pension issues. The judge found, however, that the August 7 meeting ended shortly after Boltuch rejected Honda's final offer. Thereafter, a representative of the Engineers and Scientists told Honda's representatives that they had to leave because they were trespassing and making too much noise, and if they did not leave, the police would be called.

including Honda's proposed pension plan (the "Boas plan") and Honda's commission wage proposal for parts employees that had been tendered on June 16, the last session before the hiatus. As quid pro quo for Honda's reevaluation of current proposals, the Union agreed to hold in abeyance almost all information requests pending receipt of Honda's new proposals.

In a letter to Hulteng dated June 29, 2 days after his telephone conversation with Hulteng, Boltuch asked "in the interim" only for all copies of forms 5500 "for all the years that the San Francisco pension/401(k) or other retirement plans have in existence," and he noted that even this request would be withdrawn if Hulteng's office were to inform him that the Machinists' and Teamsters' pension funds would be restored (R. Exh. C-59). Allowing for the possibility that those plans might not be restored, Boltuch stated that it would be necessary for Teamster and Machinist representatives to meet with "the appropriate person selected by San Francisco Honda with respect to the pension/retirement funds." He gave the name of the individual who would probably represent the Teamsters at such a meeting and asked Hulteng to "inform me as to when the representative of San Francisco Honda will be available for such meetings." So far as the record shows, Hulteng did not promptly get back with available meeting dates.

Once negotiations following the hiatus resumed, the Teamsters sent a letter, dated July 24, requesting possible meeting dates with someone connected with the pension plan administrator (Wyatt & Company). Dates in late July and early August were offered. A meeting was set for and held on August 9, notwithstanding the fact that pension fund specialists from both the Teamsters and the Machinists, as well as Boltuch or one of his associates, needed to be free of conflicting obligations, that Boltuch was also representing unions in negotiations with Royal and German, and that, according to Teamsters attorney Allen, the Teamsters pension specialists had a preexisting commitment to a conference in Seattle during the first week of August.

Analyzing these facts, we disagree with the judge that the Teamsters should be faulted for failing to pursue the pension issue during a mutually agreed to hiatus in bargaining. The Union was merely honoring Honda's request for a hiatus and the parties' own agreement to temporarily suspend negotiations. Boltuch's letter to Hulteng clearly gave Hulteng the option of either putting the union pension plan in its proposal or giving him dates for a meeting with Honda's pension plan representative. The record does not show that Hulteng gave any prompt response before negotiations resumed after the agreed-upon hiatus. On the basis of the facts set out above, we cannot find that the meeting held with the pension plan administrator on August 9, after the renewed requests for meeting dates in the Teamsters' July 24 letter, had been delayed by dilatory tactics on the part of the Teamsters.

On July 14, following the resumption of bargaining, Honda Attorney-Negotiator Franklin announced that Honda would continue to work from its June 21 proposal. Boltuch then renewed the Teamsters' prior information requests that had been held in abeyance until receipt of Honda's "new proposals" and that Boltuch claimed were necessary for presentation of an informed counteroffer. When Boltuch explained that a meeting with Honda's pension plan administrators (Wyatt & Company) had to occur before the Teamsters could fully evaluate Honda's pension proposal and determine if a counteroffer was required, Franklin professed not to understand why such a meeting was necessary and why it had not taken place earlier. When Boltuch asked Franklin at the July 14 session to provide specific information about the Boas pension plan so that Teamsters could determine exactly what the employees would receive, Franklin responded that she did not understand why the Union was asking for the information.

As the judge found, part of the confusion over the pension plan related to inconsistent representations made by Franklin both before and on July 14 as to the amount, if any, of Honda's contribution. Ultimately, Franklin responded that Honda would not guarantee or put specific pension or benefit contributions in the contract. Boltuch stated that without specifics he could not analyze the plan or tell employees what they would be receiving. Franklin retorted, "What's the difference?" She stated that a committee of people selected by Honda would determine what Honda would contribute to the pension plan. Boltuch expressed the concern that Honda's committee was retaining the absolute right to alter the benefit level and control benefits. Boltuch said the Teamsters wanted a specific pension guarantee in the contract; otherwise Honda was effectively retaining the right to eliminate the pension plan. It was in this context that Boltuch stated, on July 14, that the Teamsters could not accept Honda's pension plan as proposed.

Thereafter, at the August 7 final meeting, Franklin insisted on receiving the Teamsters' wage and pension offer for parts unit employees notwithstanding that this was the first time, after the Teamsters' July 18 receipt of information requested before the start of the bargaining hiatus on June 16, that the parties had bargained over the issue of wages for parts employees.[48] Boltuch requested gross profit data for July, which it needed to evaluate the effect of Honda's wage offer, and was told that it would be available in a week. He then requested it when it became available. Although Franklin continued to insist that Teamsters present a counteroffer on wages, Boltuch insisted on giving a full counteroffer on each section of Honda's final proposal so that Honda could evaluate the

[48] Honda had first proposed its new commission plan for parts employees at the June 16 negotiating session, the last one before the hiatus began.

Teamsters' wage proposal in light of the rest of the Teamsters' offer. (R. Exh. N-47A at 1177.) Boltuch stated that Teamsters was not willing to accept Honda's specific wage offer, but was willing to accept the commission concept. In this regard, Boltuch explained why the Teamsters could not agree to Honda's commission concept as written and proposed, and he gave counteroffers on the areas he disagreed with. (See Tr. 6117; R. Exh. N-24 at 628.) For example, Boltuch stated that Teamsters wanted a minimum guarantee of hours in the workweek because he thought that employees would suffer a wage cut under a commission plan as opposed to an hourly wage compensation scheme. The Teamsters' counteroffer contained concessions not acknowledged by the judge, including a reduced overtime proposal, agreement to Honda's proposal for a 4-day week, withdrawal of Teamsters' proposal for pensions for temporary employees, and acceptance of the concept of part-time employment in the parts department.[49]

On August 9, Teamsters' attorney-negotiator, Allen, and benefit consultants from the Teamsters met for the first time with Wyatt & Company concerning the specifics of the Boas pension plan. Prior to the August 9 meeting, the Teamsters had received little current information from Honda regarding implementation of the proposed Boas pension plan. Significantly, it was not until the August 9 meeting that the Union was provided with a current copy of Honda's pension plan and amendments. At this meeting, Honda's attorney, Justin Seamans (Hulteng's associate), told Allen that Honda's pension plan had already been implemented. The pension plan that Honda implemented on August 9 was a bare-bones pension proposal that had remained unchanged throughout negotiations and that contained employee enrollment dates that coincided with the original June 30 expiration date of the Teamsters contracts, despite the extensions of these contracts through the end of July.[50]

In light of the foregoing, we find, contrary to the judge, that the parties were not at impasse on August 7. The prospects for reaching an agreement had not been exhausted and the parties were not deadlocked. *Taft Broadcasting*, supra*; Hi-Way Billboards*, supra. As noted, the Teamsters made numerous concessions on that date. Contrary to the judge, we find that the Union's agreement to accept the concept of a commission plan was not illusory or deceptive or given at the "11th hour." In fact, this agreement occurred during the first bargaining session after the Teamsters received information explaining that the plan based commissions on a percentage of gross profits. In our view, the Teamsters reasonably asked for the most recent information concerning gross profits and made a counterproposal that indicated a willingness to accept a commission system so long as employees received a minimum guaranteed workweek to protect against a wage cut.

The parties continued to bargain on other issues on August 7. Honda continued to entertain counteroffers from the Union and requested additional counteroffers on wages, holidays and pensions. These facts undermine the judge's finding that the prospects for reaching an agreement had been exhausted and indicate that the parties were not yet at impasse on major issues. In fact, the critical August 9 meeting with Wyatt & Company over perhaps the most important issue in negotiations—pensions—had not yet occurred. As the Teamsters explained at the table on August 7, the pension issue affected the substance of a full counterproposal and the elasticity of the Teamsters' bargaining position.

Finally, it is evident from Teamsters' August 7 attempt to make concessions on wages, holidays, and overtime, that Teamsters saw room for movement and additional bargaining, especially once it had obtained more details regarding Honda's pension proposals and other significant benefit costs at the impending August 9 meeting with Honda's pension administrator and experts. At the August 9 meeting, however, Honda Attorney Seamans told Teamsters Attorney Allen that Honda's pension plan had already been implemented. Thus, at the time of Honda's August 9 implementation of its final offer, the Teamsters had not yet had a meaningful opportunity to evaluate fully the critical pension and benefit information or to finalize its counteroffers. This precluded the parties' reaching a genuine impasse at that point**.** *Dependable Maintenance Co.,* 274 NLRB 216, 219 (1985). Moreover, Honda never claimed that cost concessions were needed by August 9 because of economic exigencies. See *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995).

In sum, the record does not support Honda's claim that further negotiations with the Teamsters would have been fruitless after August 7. Consequently, we find that the parties were not at impasse at the time that Honda implemented its final offer on August 9. We conclude that Honda violated Section 8(a)(5) by implementing its final

[49] We do not dispute the judge's finding that Boltuch responded angrily and loudly to what the judge referred to as Honda representative Franklin's badgering and provocations and that the August 7 meeting ended when the parties were evicted from the negotiating venue because of complaints of too much noise. But even accepting the judge's conclusion that the Teamsters might have prevented the eviction, we do not agree that the eviction brought about an impasse in negotiations. As to Boltuch's use of profanity in this and other meetings, we note that "[a]ngry outbursts . . . made in the heat of bargaining are realities of negotiations." *American Packaging Corp.*, 311 NLRB 482 fn. 5 (1993). We know of no case in which the use of profanity at the negotiating table was relied on for a finding that a party had engaged in dilatory tactics or that the parties were at impasse.

[50] Specifically, Honda's implemented pension proposal provided:

> *Section 14—Pension Plan*
>
> All Employees employed on July 1, 1989 shall be enrolled in the Boas International Motors Pension Plan. New employees shall be enrolled after a one- (1-) year waiting period.

offer on August 9 in the absence of a bona-fide impasse in bargaining.

B. Honda's Lockout of Teamsters

We have reversed the judge's finding that negotiations between Honda and the Teamsters had reached a lawful impasse on August 7. Accordingly, we must address the "derivative allegation," dismissed by the judge, that the Respondent's lockout of the parts and service employees on August 8 was unlawful.

The General Counsel contends that the lockout, prior to the Respondent's August 9 implementation of its final offer, was undertaken as part and parcel of Honda's unlawful effort to abort the bargaining process by declaring impasse. Accordingly, relying on *Prentice-Hall, Inc.*, 290 NLRB 646 (1988), the General Counsel argues that the lockout was not undertaken in support of a legitimate bargaining position and violated Section 8(a)(5). The General Counsel also contends that the lockout constituted discrimination against employees, in violation of Section 8(a)(3) and (1) of the Act, because it was motivated by the same unlawful plan as the Respondent's declaration of impasse and unilateral change in working conditions. According to the General Counsel, the lockout had a coercive effect on employees' exercise of their Section 7 rights because they reasonably perceived that the lockout was punishment in retaliation for the insistence of their bargaining representative on good-faith collective-bargaining negotiations. We find merit in the General Counsel's arguments.

Here, we find that Honda's lockout of its employees represented by the Teamsters does not meet the *American Ship Building* standard for a permissible bargaining lockout. We have found that Honda implemented its final offer at a time when it had neither reached a valid impasse in its negotiations with the Teamsters, nor asserted the existence of economic exigencies. We find that Honda locked out its employees with the intent of retaliating the against them for the insistence of their bargaining representative on good-faith collective bargaining. By that conduct, Honda has violated Section 8(a)(3) and (1) of the Act. *Teamsters Local 639 (D.C. Liquor Wholesalers)*, 924 F.2d at 1078, 1085 (D.C. Cir. 1991); *Clemson Bros.*, 290 NLRB 944, 945 (1988). Compare *Darling & Co.*, 171 NLRB 801 (1968), enfd. sub nom. *Lane v. NLRB*, 481 F.2d 1208 (D.C. Cir. 1969) (lockout was lawful where a strike was anticipated and purpose of lockout was to prevent work stoppage during employer's busy season).

We further find that Honda locked out its employees with the intent of coercing the Teamsters to accept its unilaterally implemented final offer. Because, Honda's unilateral, pre-impasse implementation of its final offer constituted an unfair labor practice, the final offer does not constitute a "legitimate bargaining position" that Honda was free to pursue through the use of a lockout. *Prentice-Hall*, supra; *D.C. Liquor Wholesalers*, 924 F.2d at 1085.[51] Accordingly, we find that Honda used the lockout "in the service of designs inimical to the process of collective-bargaining," that is, to avoid its collective-bargaining obligation. Honda thus violated Section 8(a)(5) of the Act.

V. THE *MCCLATCHY* ALLEGATIONS

We have adopted the judge's finding that the parties had not reached valid impasse in the German-Teamsters negotiations and, thus, that German violated Section 8(a)(5) of the Act when it implemented its final offer to Teamsters. We also have found, contrary to the judge, that the parties had not reached valid impasse in the Royal-Machinists, German-Machinists, and German-Painters negotiations and, thus, that these Respondents similarly violated Section 8(a)(5).[52]

Alternatively, we now find, contrary to the judge, that implementation of the final wage proposals by the Respondents in the Royal-Machinists, German-Machinists, German-Painters, and German-Teamsters negotiations was unlawful under the Board's reasoning in *McClatchy Newspapers*, 321 NLRB 1386 (1996) ("*McClatchy II*"), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 118 S.Ct. 2341 (1998); and *McClatchy Newspapers*, 322 NLRB 812 (1996) ("*McClatchy III*"), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 118 S.Ct. 2341 (1998).[53] Accordingly, we find that Respondents Royal and German have violated Section 8(a)(5) and (1) of the Act by implementing their final wage proposals. On that basis, we shall order the Respondents, inter alia, to bargain with the Unions about the timing and amounts of employee merit increases.

A. Legal Standard: Colorado Ute and McClatchy

It is well established that merit pay is a mandatory subject of bargaining. Thus, pursuant to Section 8(d) of the Act, an employer has a duty to bargain over the proce-

[51] We note that in *D.C. Liquor Wholesalers* the association employers' lockout occurred after the unlawful unilateral implementation of the final offer, while here the lockout occurred before the unlawful implementation in an attempt to compel acceptance of the final offer. In either situation, the employer acts at its peril, because the lawfulness of the lockout turns on the lawfulness of the employer's bargaining position.

[52] The General Counsel does not now contend with regard to Honda-Teamsters, as he does regarding the other sets of negotiations between parties in this case, that the implemented wage proposals were unlawful pursuant to the Board's *McClatchy Newspapers* line of cases, discussed infra.

[53] Prior to these decisions, the Board had addressed the implementation issue in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992), and *McClatchy Newspapers*, 299 NLRB 1045 (1990) ("*McClatchy I*"), enf. denied 964 F.2d 1153 (D.C. Cir. 1992). As explained below, in the face of judicial rejection of the analysis in those two cases, and the D.C. Circuit's remand to the Board for further consideration, the Board applied a revised rationale in *McClatchy II* and *McClatchy III*.

dure and criteria for granting merit increases to employees. *NLRB V. Katz*, 369 U.S. 736, 745 (1962).

In *Colorado Ute*, 295 NLRB at 608–609, the Board observed that:

> Even where a merit program with procedures and criteria is lawfully in place, the actual granting of merit increases under the program may involve substantial discretion. The implementation of a merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted. *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

Although an employer may insist to impasse on a merit pay proposal which seeks a union's waiver of the right to bargain over the timing and amount of merit increases, absent the union's agreement the employer is not free to grant merit increases without consulting with the union. Id. at 610. Thus, in *Colorado Ute*, the Board held that the employer violated Section 8(a)(5) and (1) by unilaterally implementing a merit wage proposal which: did not provide for minimum or maximum amounts; left the timing and amount of increases to the sole discretion of the employer based on the employer's assessment of employees' "individual performance" and "contribution to the job;" contained no criteria for making those assessments; and exempted the employer's merit pay decisions from challenge through the contractual grievance procedure.

Similarly in *McClatchy I*, the Board found unlawful an employer's post-impasse, unilateral implementation of a merit pay proposal that set no objective criteria for the amounts or timing of merit increases and failed to provide for union participation either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure. There the Board observed that the union did not waive its right to bargain over the timing and amounts of the merit pay increases. Consequently, the Board stated, 299 NLRB at 1046–1047:

> [T]he Respondent was free to insist to impasse that the Union agree to waive its statutory rights, but was not privileged to proceed with implementation after impasse as though it had successfully secured the Union's waiver. Accordingly, the Respondent had a lawful right after impasse unilaterally to consider employees for merit increases; however, as announced in *Colorado-Ute*, supra, it still had a duty to bargain with the Union about the timing and amounts of the merit increases prior to granting any such increases.

As noted above, and pointed out by the Respondents in their briefs, after the judge's decision issued in this case, the U.S. Court of Appeals for the District of Columbia rejected the Board's reasoning in *McClatchy I* and denied enforcement of the Board's decision. The Court rejected the Board's waiver theory and remanded the case to the Board, with guidance, to articulate a reasoned and legally supportable rationale as to why the employer's implementation of its merit pay proposal violated the Act. *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153 (D.C. Cir. 1992).

On remand, in *McClatchy II*, the Board adhered to its position that the employer's merit pay proposal was a mandatory subject of bargaining and that the employer lawfully could insist on this proposal to impasse. The Board also adhered to the conclusion that the employer's implementation of the proposal violated Section 8(a)(5) and (1). In reaching this conclusion, however, the Board adopted a revised rationale, consistent with the guidance provided by the D. C. Circuit.[54] The Board held that (Id. at 138):

> [P]reservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.

Noting that a bargaining impasse is a temporary circumstance and an economic tool designed to further the bargaining process, the Board concluded that "the impasse doctrine, therefore, is not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective-bargaining process" (footnote omitted). Id. at 1390. The Board reasoned that such disparagement would result if employers were given unilateral authority over wage increases without standards, criteria, limitation as to time, or the union's agreement. Permitting an employer to implement its discretionary merit pay proposal would effectively prevent a union from breaking an impasse by resumed bargaining, since there would be no fixed status quo from which it could intelligently bargain. Thus, the effect of an employer's unilateral implementation would be to permit an employer to exercise its economic force while "simultaneously disparag[ing a union] by showing . . . its incapacity to act as the employees' representative in setting terms and conditions of employment." Id. at 1391. The Board made clear, however, that it was not precluding employers from attempting to negotiate to agreement on retaining discretion over wage increases, or from implementing merit wage proposals "if definable objective

[54] The rationale adopted by the Board in *McClatchy II* is consistent with analysis suggested by Judge Edwards in his separate opinion, 964 F.2d at 1170–1174.

procedures and criteria have been negotiated to agreement or to impasse." Id.

In *McClatchy III*, the Board tracked its analysis in *McClatchy II* and found that the employer similarly violated Section 8(a)(5) by implementing, after impasse, its proposals that wages be set at the employer's sole discretion, based on employees' annual evaluations, and that the union's role regarding wage determinations be severely limited. The Board found, 322 NLRB 812, quoting 321 NLRB at 1391 that:

> [P]reservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary changes in the employees' rates of pay.
>
> . . . .
>
> [I]f the Respondent was granted carte blanche authority over the increases (without limitation as to time, standards, criteria, or the [union's] agreement), it would be so destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

In enforcing *McClatchy II* and *III*, the D. C. Circuit, approved the exception carved out by the Board to the implementation-upon-impasse rule. The court noted that the Board was free to draw on its expertise to determine that wages are typically of paramount importance in collective bargaining and to suggest that wages, unlike scheduling or a host of other decisions generally thought closely tied to management operations, are expected to be set bilaterally in a collective-bargaining relationship. *McClatchy Newspapers, Inc. v. NLRB*, 131 F.2d 1026, 1035 (D.C. Cir. 1997).

Applying the principles of *McClatchy II* and *III*, we find below that the wage proposals implemented by the Respondents were merit pay proposals and that they do not contain definable objective procedures and criteria for their application. Accordingly, we find that the proposals conferred impermissibly broad employer discretion over wages and, thus, that the Respondents' unilateral implementation of the proposals violated Section 8(a)(5) and (1) of the Act.

B. Royal-Machinists; German-Machinists; and German-Painters

As described in detail in the judge's decision, the implemented wage proposals of Royal to Machinists and those of German to Machinists and Painters were substantially the same. We now examine the specifics of those proposals.

The proposals establish a dual compensation system, by which employee compensation would be determined under either Plan A-flat rate, or Plan B-hourly compensation. Each compensation plan specifies multiple job classifications, and hourly wage levels within each classification. Under their proposals, the Respondents have retained the following unilateral authorities: (a) to chose whether to compensate individual employees under either plan A or plan B; (b) to determine initial individual employee placement in a wage plan, job classification, and wage level within classification on the basis of "experience, ability, and knowledge"; (c) subsequently to transfer employees between pay plans, at will, with 1 week's notice; (d) to advance employees between wage classifications and levels based on "ability and performance";[55] and, (e) to pay above-scale wage rates to individual employees.[56]

As noted above, the implemented proposals provide that decisions by the Respondents regarding the initial placement of employees in pay plans, job classifications, and wage levels will be based on criteria including "experience, ability, and knowledge," and that subsequent decisions to advance employees to higher job classifications and wage levels will be based on "ability and performance." Contrary to the Respondents' contention in their exceptions and briefs, we find that these decisional factors—experience, ability, knowledge, and performance—address qualitative and quantitative aspects of work and clearly involve subjective, merit-based determinations. However, the implemented proposals do not contain objective criteria for assessing the decisional

[55] As we discuss, infra, the proposals provide that "placement in levels or the failure to advance in levels shall not be issues subject to the grievance or arbitration provision."

The employee-placement provisions in the implemented proposals of Respondent German to Painters differs in substantial respects from the Royal-Machinist and German-Machinist employee placement provisions. Like the Royal-Machinist and German-Machinist proposals, German's proposal to Painters retains to German the right to determine the placement of employees in job classifications and levels within job classifications. However, unlike the other implemented proposals, the German-Painters implemented proposal expressly excludes from the contractual grievance procedure both German's unilaterally determined placement of employees within wage levels and its unilateral decisions not to advance an employee from one level to the next. It does subject to grievance and arbitration German's decision to reduce an employee's wage level; however, the proposals are unclear, on their face, regarding whether this grievability provision applies to initial placement decisions. Thus, in the German-Painters implemented proposals, German did not retain sole, unreviewable discretion over the right to reduce wages, at least after initial job placement. Compare *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 fn. 1 (1989).

[56] On brief, the Respondents assert that "such 'overscale' provisions . . . do not vest the employer with discretion over wages; rather, such clauses are often negotiated to allow for premium or bonus payments." It is not evident on the face of the "overscale" provision that the Respondents' authority is limited as the Respondents suggest. Given the absence here of objective criteria defining the scope of the Respondents' discretion under this provision, we find no basis in the record for finding the existence of limitations on employer discretion over wages suggested by the Respondents.

factors. Nothing in the language of the implemented proposals prevents the Respondents from initially placing employees in lesser job classifications and wage levels than those they occupied before the Respondents implemented their final proposals. Thus, the proposals permit the Respondents to reduce employee wages unilaterally, at least at the initial placement stage.

Further, as we have noted above, the Respondents reserved the unilateral authority to slot employees in one pay plan and then transfer them between pay plans with 1 week's notice, at will, apparently for any reason. Placement decisions and denials of advancement are grievable under the Royal-Machinists and German-Machinists proposals; however, the German-Painters proposals expressly provide that placement and advancement decisions are not grievable. Thus, the implemented proposals create a situation in which the Respondents have very broad discretion to initially determine and redetermine at will, on a unilateral and unlimited basis, employees' basic wages. Although the Royal-Machinists and German-Machinists proposals permit grievances and arbitration of classification and placement decisions, as noted, the proposals contain no objective criteria that would form the basis for meaningful grievance arbitration over the decisions. The German-Painters provisions preclude grievance and arbitration of such decisions altogether.

In addition, the implemented proposals reserve unilateral discretion in the Respondents to determine the timing and amounts of wage increases. Advancement within job classifications and wage levels is tied to periodic employee reviews; however, reviews are provided for "periodically, but no more often than once every six (6) months."[57] The Respondents reserve the right to institute "individual voluntary incentive programs," the criteria and terms of which are not established in the implemented proposals.

Flat-rate wages are calculated by multiplying an employee's flat-rate hourly compensation level by the time allotments for each job, with a guarantee of a minimum base wage rate. Although the implemented flat-rate proposals establish a floor for wages, they also permit the Respondents, at their sole discretion, to pay some employees above scale, at rates and under conditions that are not spelled out in the proposals. In effect, then, the flat-rate proposal leaves the determination of the maximum wage rate to the discretion of the Respondents. Although the implemented proposals purport to establish wage scales within a minimum and maximum amount, the net effect of the wage-setting provisions in their entirety is that the Respondents can alter the maximum wage at will; and there is established no "fixed status quo" from which the Unions could grieve the Respondent's exercise of its reserved authority to make individual wage determinations.

The Respondents claim unfettered discretion regarding other critical aspects of employee wages. The Royal-Machinists and German-Machinists final offers provide that flat-rate time allotments are to be obtained from "the appropriate MSRT manual or other manual used in the industry or the shop." They further provide, however, that "the Service Manager may substitute his own estimate of the time necessary to complete a job in circumstances where unanticipated or unusual difficulties arise."[58] However, the implemented proposals do not specify clearly defined, objective criteria for the service manager's substitution of his own judgment for time values in the industry manuals. Thus, contrary to the Respondents' contention that the use of industry manuals limits their discretion over flat-rate time and pay, we find that the limitation is substantially compromised by the reservation of discretion to ignore the manuals.[59] It

[57] The Respondents contend that performance reviews are "mandated" under the implemented proposals to be conducted "periodically," and that these provisions limit the Respondents' discretion over the timing and amount of increases. The Respondents further contend that their discretion over employee advancement between job classifications is tempered by these performance review provisions. Our examination of those provisions does not find support for the Respondents' interpretation. Provision for performance review is made "[a]fter the first year of employment . . . but no more often than once every six months" and "more frequently during the first year of employment, as the Employer deems necessary." Further, "[a]n employee shall be eligible for consideration for advancement at each review." We find that these provisions create a general outline of a performance review and advancement system that is indefinite as to frequency of review, unclear as to performance criteria that will inform the review process and result in advancement, and noncommittal as to timing of advancement. As we have noted, in any case, employer decisions regarding advancement of employees are not grievable.

The Respondents point out that the meaning of the word "periodically" in the performance review provisions is subject to review under the grievance procedure, and that this grievability aspect of the provisions remove the review process from the Respondents' sole discretion. In the absence of any contractual standard against which the Respondent's actions could be measured, however, we find that the fact that the potential arbitrability of the term "periodically" does not significantly limit the Respondent's discretion to set wages. Once every 3 years, for example, could be said to be "periodic."

[58] German's implemented wage proposal to the Painters does not rely on standard industry manuals. Rather, it provides that "[f]lat rates will be based on the Body Shop Manager's estimate of the time necessary to complete the job." Thus, the flat rate time estimates are set in the sole discretion of the Body Shop Manager.

In the Royal-Machinists and German-Machinists implemented proposals, the provisions do not specify which industry manual will be used to establish flat-rate hours. There is no evidence in the record to show that all the industry manuals available for use for this purpose contain standard time estimates or that they do not vary from one another. Thus, although industry manuals presumably are based on objective standards, nonetheless, we cannot characterize this aspect of the Respondents' implemented proposals as establishing clear objective criteria for the time portion of the flat rate wage calculation.

[59] As we discuss elsewhere in this decision, this broad discretion to establish flat rate time estimates is particularly significant in view of the discipline and discharge provisions of the Royal-Machinists and German-Machinists implemented proposals, which expressly permit discipline and discharge for lack of efficiency, as measured by reference to industry manuals, and which exempt such discipline and discharge decisions from review under the parties' contractual grievance

seems clear to us that the use of substituted time estimates necessarily would affect flat-rate wages. Accordingly, it appears that the service manager can alter the flat-rate wages of an employee at will by exercising his authority to deviate from the industry standard flat-rate time estimates.

Further, the implemented proposals provide that the service manager has sole authority to determine when flat-rate payments are earned or accrued in favor of an employee, and when the accruals will be paid to the employees. This provision, too, appears to vest discretion in the service manager unilaterally to alter the timing of wage payments by his determination of wage accruals. In addition, the implemented provisions require employees to "absorb" the time costs of comebacks.[60] The service manager has the sole authority to determine what work constitutes a comeback. The implemented provisions do not establish criteria for making that determination, yet the decision whether work constitutes a comeback may affect an employee's compensation.

The broad discretion over wages retained by the Respondents under the implemented proposals becomes even more apparent when they are analyzed in conjunction with the grievance-arbitration provisions of the implemented proposals. The proposals provide for grievance and arbitration of "any disputes . . . relating to the employment relationship." Excluded from consideration under the grievance-arbitration systems, however, is the discipline or discharge of an employee for "lack of efficiency" or "quality of workmanship."[61] Respondents' contractual wage and performance appraisal schemes expressly condition the determination of employee efficiency and workmanship, at least in part, on the service manager's discretionary allocations of flat-rate time estimates, comebacks, and wage accruals.[62] As noted above, we have found that the parties did not negotiate to agreement or impasse regarding objective criteria and procedures for the determination of those wage-related decisions. We find that the lack of decision-making criteria, operating in conjunction with the exclusion of the subject discipline and discharge decisions, effectively oust or impermissibly limit the Unions from a meaningful representative role in protecting employees against unjustified discipline and discharge based on efficiency and workmanship.

For all the above reasons, we find that the implemented proposals in Royal-Machinists, German-Machinists, and German-Painters reserve to the Respondents impermissibly broad discretion to grant merit wage increases, without clearly defined objective standards, criteria, and procedures for the exercise of their discretion, and without reaching agreement or impasse with the Unions. We further find that the Respondents' reservation of carte blanche authority over merit pay is inherently destructive of fundamental principles of collective bargaining. Thus, by implementing those provisions, the Respondents have failed the test of *McClatchy* by conferring on themselves "broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees rates of pay." *McClatchy II* at 1388.

Accordingly, we find that Royal violated Section 8(a)(5) and (1) of the Act by implementing its final wage proposal to the Machinists, and that German violated Section 8(a)(5) and (1) by implementing its final wage proposals to the Machinists and the Painters.

C. German-Teamsters

For essentially the same reasons stated in the preceding section (V-B), we find that German's implemented wage proposals to Teamsters (separately covering service and parts employees) reserve impermissibly broad discretion over wages. Thus, we find that German violated Section 8(a)(5) and (1) by implementing the proposals.

German's implemented proposals to the Teamsters resemble the proposals discussed in section V-B above in the following respects. Its proposal covering Service employees (service proposal) establishes a single, hourly wage system consisting of three job classifications and multiple wage levels within each classification. Its proposal covering parts employees (parts proposal) establishes a dual wage system, with hourly and incentive pay options, similar to those discussed in part V-B, above. German retains sole discretion to determine initial em-

procedures. Although the German-Painters implemented proposals do not make specific reference to the possibility of discharge for inefficiency, neither do they expressly exclude lack of efficiency as a basis for discharge.

[60] Comebacks are defined as improperly completed work that must be redone or corrected.

[61] As noted, above, German did not implement these disciplinary provisions when it implemented its final offer to Machinists on July 5, although it apparently did not inform the Machinists about the omission. We find this significant for purposes of our finding that the parties were not at impasse on July 5, particularly in view of German's failure to give Machinists sufficient time before declaring impasse to analyze production and other information to determine the effect of the German's production-based wage proposals and their potential disciplinary effect on unit employees. It is unclear whether German intended to implement the disciplinary proposals at a future time; in any case, it does not appear that German formally withdrew those proposals.

[62] The provision regarding discipline and discharge for lack of efficiency expressly provides that efficiency shall be measured "by reference to the appropriate MSRT manual or other manual used in the industry." As we have noted infra, the service manager has unfettered discretion to substitute his judgment for the flat-hour times specified in an industry manual. Moreover, the Royal-Machinists and German-Machinists proposals link forgiveness of discipline for lack of efficiency, under the Employers' progressive disciplinary system, to an employee's successfully "achieving 100% efficiency for six months." The provision regarding discipline and discharge for quality of workmanship provides that that "[q]uality of workmanship will be measured by a standard of not more than five percent (5%) of the individual's produced [*sic*] time resulting in comebacks." We have noted that the implemented provisions vest in the service manager the sole discretion to determine whether work is a "comeback" and whether the comeback will be charged to an employee.

ployee placement within dual pay plans, job classifications, and wage levels within classifications, and employee advancement between wage classifications and levels based on merit, as measured by employee experience, ability, knowledge, and productivity. The proposals do not establish objective criteria for assessing those merit factors.

Like the pattern generally established by the parties in their various negotiations, German reserves to itself the "sole prerogative . . . to pay wages and bonuses in excess of wages required [in the parts and service compensation plans]" as long as the minimum wages specified are observed. Thus, the proposals establish minimum wage levels, but leave to German's sole discretion the determination of maximum wage rates through the exercise of its judgment to pay individual employees above scale. The proposals do not limit German's discretion over the timing and amount of merit increases, or establish objective criteria for granting increases. Although the service and parts proposals provide for grievance arbitration of disputes relating to the employment relationship, the Union's ability to bargain over German's wage decisions is rendered ineffective by the lack of objective criteria for making wage decisions and the resulting lack of "a fixed status quo from which they can intelligently bargain." *McClatchy II*, 321 NLRB at 1391. Finally, we note that German's proposal also reserves to German sole discretion to "remove" above-scale pay at any time, without express limitation, condition, or criteria.

Accordingly, we find that German's implemented service and parts proposals "confer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in employees' rates of pay," and that their implementation runs afoul of the Board's decision in *McClatchy II*.

D. Conclusion

In finding that Respondents Royal and German have violated the Act by implementing their wage proposals to the Unions, we emphasize that we do not "sit in judgment upon the substantive terms of collective-bargaining agreements." *American National Insurance Co.*, 343 U.S. 395, 404 (1952). We hold only that by implementing without agreement impermissibly broad wage proposals, as described above, Royal and German have disparaged the Unions' ability to bargain knowledgeably and, thus, have used the collective-bargaining process "as a device to destroy, rather than further, the bargaining process." *McClatchy II*, 321 NLRB at 1390–1391.[63]

[63] As noted above, German's implementation was also unlawful because no impasse had been reached.

Member Brame agrees with his colleagues that under all the circumstances of this case, the wage proposals implemented by Respondent Royal Motors (with respect to the Machinists unit) and German Motors (with respect to the Machinists, Teamsters, and Painters units) reserved effectively unlimited discretion to the Respondents with regard to rates of pay, and that their implementation accordingly violated Sec. 8(a)(5). Because the wage proposals at issue in this case reserve to the employers substantially broader discretion with regard to rates of pay than those found unlawful in the *McClatchy* cases, Member Brame does not pass on whether the *McClatchy* line of cases were correctly decided on their facts in reaching this conclusion.

AMENDED CONCLUSIONS OF LAW

1. The Respondents, Royal Motor Sales, German Motors Corp. and San Francisco Honda, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions, Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO; Automotive Machinists Local Lodge 1305 and Machinists Automotive Trades District Local No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO; and Auto, Marine and Specialty Painters Union, Local 1176 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Royal Motor Sales violated Section 8(a)(1) of the Act by a supervisor telling an employee that he could make more money if the Union was not there; by a supervisor telling another employee that those employees who were going to stay were going to be nonunion and that anyone who stayed would have to be nonunion or be replaced; by a supervisor telling another employee that it was useless to wear a union hat because there was not going to be a union anymore; and by a supervisor asking an employee to sign a decertification-like petition and offering the employee a bonus to sign the petition.

4. Respondent Royal Motor Sales violated Section 8(a)(1) and (5) of the Act by a supervisor dealing directly with an employee who was represented by a labor organization over wages then being negotiated by telling the employee he could earn more money under a flat-rate system of wages if the union were not there; by unilaterally implementing its final offer to the Machinists, at a time when it had not bargained to impasse; by unilaterally implementing an impermissibly broad merit wage proposal to the Machinists; and by attempting to withdraw recognition from the Machinists, thereby refusing to bargain at a time when Royal Motor Sales did not doubt in good faith the Machinists' majority status.

5. The Machinists Union is, and was at all times material to this proceeding, the exclusive bargaining representative of Royal's employees in the following unit:

> All full-time and regular part-time employees employed by Respondent Royal Motor Sales whose job classifications were covered by the 1986–1989 collective bargaining agreement between Royal Motors Sales and the Machinists Union, excluding all other employees, guards, and supervisors as defined in the Act.

6. Respondent German Motors Corp. violated Section 8(a)(1) of the Act by a supervisor telling an employee that he would be better off without the Union, and by telling the same employee that if he did not like to work there in a nonunion setting, he could find a job elsewhere; by a supervisor telling an employee he could make more money under a flat-rate system; by a supervisor telling an employee that a benefit plan was not available to him because he was in the Union and the Union was opposed to it; and by a supervisor telling an employee, "this is a time for no unions."

7. Respondent German Motors Corp. violated Section 8(a)(1) and (5) of the Act by dealing directly with all employees who were represented by a labor organization concerning employee parking; by making unilateral changes in its parking policy that were not reasonably comprehended within the earlier offers to the Unions; by dealing directly with employees in the Machinists' unit and Teamsters' units regarding fringe benefits by holding meetings with employees in these units to present benefit proposals; by a supervisor dealing directly with an employee who was represented by Teamsters and by conferring with the employee on the content of proposals to be presented to the Union; by attempting to withdraw recognition from the Machinists, Teamsters, and Painters, thereby refusing to bargain at a time when German Motors Corp. did not doubt in good faith the Unions' majority status; by unilaterally implementing its final offer to the Machinists, Teamsters, and Painters at a time when it had not bargained to impasse; and, by unilaterally implementing impermissibly broad merit wage proposals to Machinists, Teamsters, and Painters.

8. Respondent German Motors Corp. violated Section 8(a)(1), and Section 8(a)(3) and (5) of the Act, respectively, by locking out its bargaining unit employees represented by the Machinists in retaliation against their union activities and in support of an unlawful bargaining position.

9. The Machinists Union is, and was at all times material to this proceeding, the exclusive bargaining representatives of German's employees in the following appropriate unit:

> All employees covered by the 1986–1989 collective-bargaining agreement between Respondent German Motors Corporation and the Machinists Union; excluding all other employees, guards, and supervisors as defined in the Act.

10. The Teamsters Union is, and was at all times material to this proceeding, the exclusive representative of German's employees in the following appropriate units:

> All full-time and regular part-time employees employed by German Motors Corp. whose jobs classifications were covered by the 1986–89 Parts agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time employees employed by German Motors Corp. whose job classifications were covered by the 1986–89 Service agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.

11. The Painters Union is, and was at all times material to this proceeding, the exclusive representative of German's employees in the following appropriate unit:

> All employees covered by the 1986-1989 collective-bargaining agreement between Respondent German Motors Corporation and the Painters Union; excluding all other employees, guards and supervisors as defined in the Act.

12. Respondent San Francisco Honda violated Section 8(a)(1) and (5) of the Act by unilaterally implementing its final offers to the Teamsters at a time when it had not bargained to impasse.

13. Respondent San Francisco Honda violated Section 8(a)(1), and Section 8(a)(3), and (5) of the Act, respectively, by locking out bargaining unit employees represented by the Teamsters in retaliation for the insistence of their bargaining representative on good-faith negotiations, and in support of an unlawful bargaining position.

14. The Teamsters Union is and was at all times material to this proceeding the exclusive bargaining representative of San Francisco Honda's service and parts employees in the following appropriate units:

> All full-time and regular part-time employees employed by Respondent San Francisco Honda whose job classifications were covered by the 1986-1989 Parts agreement between the Teamsters and San Francisco Honda, excluding office clerical employees, guards, and supervisors as defined in the Act.
>
> All full-time and regular part-time employees employed by Respondent San Francisco Honda whose job classifications were covered by the 1986-1989 Service agreement between the Teamsters and San Francisco Honda, excluding office clerical employees, guards, and supervisors as defined in the Act.

15. Other than specifically found above, Respondents committed no other unfair labor practices.

AMENDED REMEDY

Having found that Respondents have engaged in certain unfair labor practices, we shall order that each Respondent cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith by unilaterally implementing "final" proposals without bargaining to impasse and by withdrawing recognition from the Unions, the Respondents shall on request of the Unions, rescind all or part of the implemented "final" proposals and bargain in good faith with the Unions as the exclusive bargaining agents of the above appropriate units of its employees with respect to their wages, hours and other terms and conditions of employment and embody any understanding reached in a signed agreement. See *Henry Bierce*, supra, slip op. at 6-7; *Caterair*, supra.[64]

In addition, having found that Respondents Royal and German violated Section 8(a)(5) and (1) of the Act by unilaterally implementing impermissibly broad merit wage proposals, we shall order the Respondents, on request by the Unions, to rescind the unlawfully implemented merit wage proposals and bargain with the Unions to agreement or impasse regarding definable, objective procedures and criteria governing raises under its merit pay proposals and the timing and amounts of such raises. See *McClatchy III*, 322 NLRB at 813.

Nothing in our Order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes in wages and benefits, and violated Section 8(a)(1), (3), and (5) by locking out certain of their bargaining unit employees, the Respondents shall make whole their employees for any losses of pay and benefits they may have suffered by reason of the unlawful lockout. The Respondents shall be ordered to remit all payments each Respondent owes to fringe benefit funds, plus any additional amounts as specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and to make whole the employees for any expenses they may have incurred as a result of each Respondent's failure to make such payments in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All loss of wages shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[64] With regard to our colleague's reference to the delay between the events at issue here and this decision, we acknowledge that such delay, even in a case such as this, with numerous complex issues and a voluminous record, is regrettable. Nonetheless, we cannot agree that a lengthy delay is warrant for not finding that violations were committed, when the record clearly establishes that they were, or in failing to order restoration of the status quo ante, i.e., conditions as they would have existed had the respondents not violated the Act. See *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) (consequences of Board delay should not be placed "upon wronged employees" to the benefit of the wrongdoers).

ORDER

The Respondents, Anderson Enterprises, d/b/a Royal Motor Sales, San Francisco, California; German Motors Corp., San Francisco, California; and San Francisco Honda, San Francisco, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

As to **Royal Motors**,

(a) Telling employees that they could make more money under a flat-rate system of wages if the Union were not there; telling employees that those employees who were going to stay were going to be nonunion and that anyone who stayed would have to be nonunion or be replaced; telling employees that it was useless to wear a union hat because there was not going to be a union anymore; asking an employee to sign a decertification-like petition and offering a bonus to do so.

(b) Dealing directly with an employee represented by a labor organization over wages then being negotiated by telling the employee that he could earn more money under a flat-rate system of wages if the Union was not there.

(c) Unilaterally implementing its final offer to the Machinists Union without first bargaining to lawful impasse; and unilaterally implementing an impermissibly broad merit wage proposal to Machinists.

(d) Attempting to withdraw recognition from the Machinists Union when Royal did not doubt in good faith the Union's majority status.

As to **German Motors Corp.,**

(e) Telling employees that they would be better off without the Union; telling employees that if they did not like to work in a nonunion setting, they could find a job elsewhere; telling employees that they could make more money under a flat-rate system; telling employees that a benefit plan was not available to employees who were in the Union; and telling employees that this is a time for no unions.

(f) Dealing directly with bargaining unit employees.

(g) Making unilateral changes in terms and conditions of employment that were not reasonably comprehended within earlier offers to the Unions.

(h) Attempting to withdraw recognition from the Machinists, Teamsters and Painters Unions when German did not doubt in good faith the Unions' majority status.

(i) Unilaterally implementing its final offer to the Machinists, Teamsters, and Painters Unions without first bargaining to lawful impasse; and unilaterally implementing impermissibly broad merit wage proposals to the Machinists, Teamsters, and Painters.

(j) Locking out its bargaining unit employees in retaliation for their union and protected activity and in support of an unlawful bargaining position.

As to **San Francisco Honda**,

(k) Unilaterally implementing its final offer to the Teamsters Union without first bargaining to lawful impasse.

(l) Locking out its bargaining unit employees in retaliation for their union and protected concerted activities and in support of an unlawful bargaining position.

As to **all Respondents**,

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Unions concerning wages, hours, and other terms and conditions of employment.

(b) On request of the Unions, rescind the unilateral changes made by Respondents in the terms and conditions of employment.

(c) Reimburse all Union trust funds, where applicable for unpaid contributions, with interest, as set forth in the "Amended Remedy" section of this decision.

(d) Reimburse employees, where applicable, for any losses sustained by reason of any loss of eligibility for health and welfare benefits caused by the unilateral suspension of contributions, with interest, as set forth in the "Amended Remedy" section of this decision.

(e) Make whole employees for any loss of wages and benefits they may have suffered by reason of the Respondents' lockout of employees and its failure to pay contractually required wages and benefits as set forth in the Amended Remedy section of this decision.

(f) Preserve and, within 14 days of a request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at their facilities in San Francisco, California, copies of the attached notices marked "Appendices 1, 2, and 3", as applicable.[65] Copies of the attached notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed their facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notices to all current employees and former employees employed by Respondent Royal at any time since November 9, 1989, and Respondents German and Honda at any time since December 14, 1989.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[65] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER BRAME, dissenting in part.

More than 10 years after the events that gave rise to this case, the majority reverses the judge's determinations that the Respondents Royal Motors, German Motors, and San Francisco Honda bargained to impasse prior to implementing final bargaining proposals. In light of these findings, the majority orders the reinstitution of bargaining relationships and restoration of a status quo that has not existed for more than a decade. Contrary to the majority, the judge's impasse findings are well-reasoned and I would adopt them. My reasons follow.

A. Background

Like the majority, I find it unnecessary to recount all that transpired during the many bargaining sessions held by the parties in this case. Those details are fully set forth in the judge's decision. However, several pertinent facts, not addressed by the majority, deserve special emphasis.

As discussed more fully in the judge's decision, beginning in the mid-1980s northern California auto dealers, including the Respondents here, sought changes in their agreements with the Unions. These changes, which generally included flat-rate compensation instead of hourly pay for auto repair work, withdrawal from union pension plans and institution of employer-sponsored 401(k) plans, and withdrawal from union health plans and institution of employer-sponsored flexible benefits health insurance coverage, were bitterly opposed by the unions representing the dealers' employees—the Machinists, Teamsters, and Painters. In 1986, and again in early 1989, however, other northern California auto dealers bargained to impasse over and subsequently implemented final offers which contained provisions for flat-rate compensation without reaching agreement with the Unions. It is undisputed that the only dealers with whom the unions were able to reach agreements were those who abandoned any effort to obtain flat rate, and that the only unionized dealers with flat-rate compensation plans were those who implemented their plan after reaching impasse.

The essence of flat rate, of course, is that employees are paid a piece rate for each service they perform on an automobile, rather than an hourly wage for each hour

worked. The employer flat-rate proposals in this case generally called for the flat rate to be set by multiplying a specified hourly rate by generally accepted industry estimates of the amount of time required to complete each specific service. The time estimates generally were derived from published standard industry manuals, although the employers' proposals reserved to the employers the discretion to use their own time estimates in certain circumstances. The employers' proposals also provided that "comebacks"—automobiles that had to be reworked because the original repair was not properly done—would be performed by the original mechanic with no additional compensation, and included procedures for discipline and/or discharge for inefficiency or poor work quality. Under the employers' proposals, the decision to invoke these procedures would not be subject to grievance arbitration.

B. Impasse

The duty to bargain collectively includes a mutual obligation of an employer and union "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158 (d). When negotiations have exhausted the prospects of reaching an agreement, the Board recognizes the existence of an impasse. In determining whether an impasse exists, the Board considers several factors:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists.

Taft Broadcasting Co., 163 NLRB 475 (1967).

The Board has recognized that "there need be no undue reluctance to find that an impasse existed. Its occurrence 'cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted.'" *E. I. du Pont & Co.*, 268 NLRB 1075, 1076 (1984) (quoting *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974)). And in this regard, the Board has recognized that, in the absence of a claim of bad faith bargaining, an employer's "firmness [with respect to an issue in negotiations] . . . militates toward rather than against a finding of impasse, especially in light of the Union's indication that it would not accept the Company's proposal." Id. See also *Seattle-First National Bank*, 267 NLRB 897, 898 (1983), enfd. 738 F.2d 1038 (9th Cir. 1984) (employer's adamant refusal to agree to dues-checkoff evidence of impasse); *Times Herald Printing Co.*, 221 NLRB 225, 229 (1975) (employer's adamant demand for manning proposals, and union's adamant rejection of them, evidence of impasse).

1. Royal—Machinists

Royal declared impasse in its negotiations with the Machinists on July 5, 1989,[1] after seven negotiating sessions. The judge found that the parties were at impasse on the issue of flat rate as of July 5, and that the lack of agreement on this single-critical issue precluded agreement generally. The judge noted that Royal was adamant that flat rate was something that it had to have, while the Machinists had steadfastly refused to accept it at other Bay Area auto dealers, and had rejected the concept in the strongest possible terms in their negotiations with Royal. In particular, the judge found that the Machinists' "Partial Offer on Flat Rate," which was presented to Royal on July 3, did not preclude a finding of impasse because it did not accept the essence of flat rate, i.e., the hourly allotment of time according to standard manuals. The judge also found unworthy of credence statements by Machinists negotiator Boltuch that he would sign a contract with flat rate if Royal took the other "givebacks" off the table, i.e., accepted the union's position with regard to them.

The majority reverses the judge and finds that the parties were not at impasse over flat rate. Relying principally on the Machinists' partial offer, the majority finds, contrary to the judge, that it accepted the principle of flat rate and this constituted significant movement that provided a basis for further bargaining. The majority also finds that there was no impasse because the Machinists had not had time to analyze requested information that it had been provided by Royal and based on Royal's 8(a)(1) violations away from the bargaining table.

The majority's conclusion that the parties were not at impasse is wholly unpersuasive. It is clear that Royal was adamant, throughout the course of the negotiations, that it would not accept any agreement that did not include flat rate.[2] Likewise, contrary to the majority, it is equally clear that the Machinists were adamantly opposed to flat rate, and were unwilling to enter into an agreement which included flat-rate compensation. Given the number of bargaining sessions held, and Royal's

[1] Unless otherwise stated, all dates hereafter are in 1989.

[2] Royal was, of course, entitled to maintain that position. There is no allegation that Royal failed to bargain in good faith. To the contrary, it is undisputed that Royal presented a complete proposal at the parties' first meeting on May 5, negotiated over all provisions of that proposal as requested by the Machinists, made concessions in many areas during the course of negotiations, and made itself freely available to meet including offering to meet on dates not accepted by the Machinists.

firmness on the issue of flat rate, it is clear that by July 5 the parties had "exhausted the realistic possibility of reaching agreement." *E. I. du Pont & Co.*, supra at 1076. As shown below, any issues relating to information requests or unfair labor practices away from the bargaining table were either unrelated to the issue of flat rate or too insignificant to affect the course of the negotiations. In either event, there is no basis for finding that these matters precluded the existence of a valid impasse on July 5.

The majority does not seriously dispute that Royal was adamant that any agreement include flat rate. Instead, my colleagues take issue with the judge's finding that the Machinists were equally adamant that they would not agree to flat rate. Contrary to the majority, the judge's finding in this regard is supported by overwhelming evidence and I would adopt it.

The record is replete with statements indicating the Machinists' unyielding opposition to flat rate. For example, during the parties' meeting on June 7, the Machinists characterized flat rate as a method for dealers to cheat customers and bust unions and stated that they would never agree to it. When Royal reminded the Machinists that they had known for five years that flat rate was coming, Machinists negotiator Boltuch responded "F*** YOU."[3] Similarly, during a German-Machinists negotiating session on June 14, Mike Day, a high-ranking Machinists official, stated that German was not really interested in flat rate but was trying to provoke a labor dispute to "bust" the union, that the Machinists' settlements with other employers had not included flat rate, and that they hoped to get state legislation banning flat rate.

The majority asserts that these statements were mere posturing, and thus refuses to give them any weight as an indication of the true state of negotiations. In contrast, the majority highlights each and every statement by the Machinists that they might accept flat rate, and finds on the basis of those statements that no impasse existed. Wholly apart from the curiously one-sided nature of the majority's analysis, their findings in this regard are incompatible with the judge's credibility findings in this case. After hearing testimony from all of the principal negotiators, the judge consistently found that the Machinists' statements about a claimed willingness to accept flat rate were unworthy of credence. As the judge recognized, these statements were entirely inconsistent with the Machinists' actions, inasmuch as they had never agreed to a collective-bargaining agreement that did contain flat rate.[4]

The Machinists' claimed willingness to enter into such an agreement is also entirely inconsistent with the delaying tactics which they consistently employed throughout the course of their negotiations with Royal. Royal presented its first proposal at the parties' first meeting on May 5. The Machinists had no proposal ready at that time, although their agreement expired June 30. There is no justification for the Machinists' inability or unwillingness to make any proposal at that time.[5] The Machinists also, inconsistently, made proposals that were applicable to the three employers involved in this case, while refusing to accept employer proposals on a joint basis or to engage in coordinated bargaining with the three employers despite the commonality of issues. While the Machinists were under no legal obligation to engage in coordinated bargaining, the foreseeable effect of their refusal to do so was to prolong the negotiations by requiring that discussions of identical proposals be repeated at successive negotiations for each employer.[6] The Machinists' inconsistent application of this principle, and their offer to engage in coordinated bargaining in return for early bargaining concessions by Royal, strongly suggest that delaying negotiations was the purpose of their invocation of their legal rights as well.

Contrary to the majority, the Machinists' presentation, on July 3, of a handwritten two page document titled "Union Partial Offer on Flat Rate" does not establish that the union was prepared to yield on this issue.[7] Initially, I

[3] Likewise, on July 3, during the parties' final negotiating session, Boltuch responded to Royal's assertion that the parties were at final position by exclaiming "I can't take [Royal bargaining representative Hulteng's] f***ing arrogance. Get him out of here." Boltuch repeatedly told Hulteng "F*** YOU! F*** YOU!" These comments, rather than the Union's (and majority's) post hoc rationalizations, would appear to be the most accurate statement of the Machinists' true understanding of the prospects for agreement.

[4] The majority fails to justify their apparent belief that the Machinists, having uniformly rejected flat-rate proposals from every auto dealer who sought flat rate at least since 1986, somehow suddenly "saw the light" in their negotiations with Royal in 1989.

Island Creek Coal Co., 292 NLRB 480 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990), cited by my colleagues as support for their handling of the judge's credibility determinations, is distinguishable. In that case, the Board found that the judge erred, as a matter of law, in relying on the union's failure to file grievances concerning possible contract violations as evidence that the employer had not violated the contract and that the union's requests for information to determine whether the employer had violated the contract were, accordingly, submitted for the purpose of harassment. In this case, the judge's credibility determinations are based on his assessment of the factual record and on the demeanor of the witnesses, not, as the Board found in *Island Creek Coal Co.*, on errors of law and logic.

[5] The majority asserts that the parties agreed that the purpose of the May 5 meeting was to establish negotiating ground rules. I find this alleged justification insufficient, inasmuch as Royal plainly was able to, and did, tender a proposal at that meeting. The Machinists' first proposal, submitted on May 18, essentially sought a continuation, with some increases of the prior agreement's basic terms and conditions. Significantly, the proposal contained no provision regarding flat rate.

[6] The employers had the same lead negotiator with respect to their negotiations with the unions, as did the Machinists and Teamsters.

[7] This document contained the following provisions: (1) discharge and/or discipline for lack of efficiency or poor workmanship would be subject to grievance arbitration; (2) disputes over the amount of time allocated to a job would be determined by a committee with two Union and one Employer representatives or "some other final and binding mechanism"; (3) instead of a $10/hour minimum compensation rate, as

note that the offer was presented late in the negotiations, after the expiration of the parties' 1986–1989 agreement.[8] Contrary to the majority, the Partial Offer does not represent movement towards Royal's position on flat rate. Among other things, the partial offer provides that flat-rate time allocations would be determined by a committee which the Machinists would control (with two representatives, as compared to one representative for Royal). Thus, the import of the Machinists' proposal is that the Union would have complete control over compensation. Assuming such a proposal was intended to be taken seriously, it is at the very least a regressive step demonstrating that agreement was becoming less likely, not more likely as the majority would have it.[9]

The majority's finding that the Union's failure or inability to analyze requested information which Royal had provided prior to the declaration of impasse is equally unavailing. In my view, it is wholly inappropriate to base a finding of no impasse on the supposed status of information requests where, as here, there is no allegation that the employer has in any way fallen short of its duty to timely provide requested information. Further, even assuming that the issue is properly before us, there is no merit to the notion that the Union's position would have changed if it had been afforded more time to analyze the information it sought. Many of the information requests cited by the majority deal with issues unrelated to the parties' disagreement over flat rate.[10] As noted above, the parties were at impasse over the specific issue of flat rate, and it was this unbridgeable gap which prevented overall agreement. Thus, information related to side issues has no bearing on the parties' impasse.

Moreover, the timing and nature of the Machinists' requests also calls into question the Union's good faith in propounding them. Thus, in this case and in connection with their negotiations with German, the Machinists requested information about the number and description of all tools owned by Royal. There is simply no basis for the majority's apparent belief that the Machinists would change their position in the negotiations after receiving this information. To the contrary, the Machinists' frivolous information requests strongly suggests that the Union believed that no agreement was possible, and was seeking either to forestall impasse and implementation of Royal's proposals, or to provide ammunition for an unfair labor practice change and litigation. In either event, unlike the majority, I would not reward such tactics.

Finally, the majority finds that Royal engaged in direct dealing in violation of Section 8(a)(5) by Service Manager Chavez' comment to employee Wong that he would make more money under Royal's flat-rate system if the Union was not there, and that this supposed violation tainted Royal's declaration of impasse. I disagree with each of these findings.

The judge found that Chavez' statement to Wong was coercive and violated Section 8(a)(1). In the absence of exceptions, I adopt the judge's finding. However, the judge did not find that the statement also constituted direct dealing, but instead *dismissed* all direct dealing allegations against Royal. I would adopt the judge's findings.

I find no merit to the majority's conclusion that Chavez' statement, which amounts to a statement by Chavez of his opinion concerning the benefits to Wong of Royal's proposals, constituted direct dealing, as it is undisputed that Royal's proposals had previously been communicated to the Machinists. Rather, the statement is an expression of Chavez' opinion about the merits of a proposal on the bargaining table and is accordingly protected speech under Section 8(c). *Putnam Buick*, 280 NLRB 868 (1986), enfd. 827 F.2d 557 (9th Cir. 1987).[11] Further, there is in any event no showing of any causal nexus between Chavez' statement and the impasse in negotiations and therefore no basis for finding that this isolated unfair labor practice affected the course of the parties' negotiations.

2. German Motors—Machinists

German declared impasse in its negotiations with the Machinists after eight negotiating sessions. The judge found that German and the Machinists were at a lawful

proposed by Royal, the Machinists proposed minimum pay of 85 percent of the flat-rate compensation level; and (4) adding a provision that "The Employer subscribes to the principle of fair and impartial dispatching [of mechanics to a job]."

The judge did not credit Hulteng's testimony that Royal never received the proposal and there are no exceptions to this finding.

[8] The Machinists, and the other unions involved in this proceeding, had a clear motivation to delay the progress of negotiations in order to place economic pressure on the employers to accept the unions' position. In this regard, it is clear that flat rate compensation was fast becoming the standard in this industry and that the employers perceived that moving their mechanics to flat rate would be more profitable, by rewarding fast, accurate work and penalizing slow or incorrect work. In that context, the last minute presentations by the unions appear to be designed to stretch out negotiations and avoid an impasse declaration in order to deny the employers the ability to change their compensation system and improve their profitability. I believe that the judge correctly interpreted the unions' strategy and properly discredited as insincere the unions' last minute protestation of interest in some sort of flat-rate system.

[9] The Machinists' "dispute resolution" procedure, on its face, would apply whenever the Machinists disagreed with a flat-rate allocation, including but by no means limited to cases where Royal exercised its discretion, under its proposals, to set an allocation without reference to industry manuals.

The partial offer alternatively provided that flat rate disputes could be resolved by some other, unspecified binding method. In the absence of a specific alternative proposal, I would find that the partial offer is too vague in this regard to be considered a good-faith attempt at movement by the Machinists.

[10] The majority cites information requests concerning the administrator of a proposed benefit plan and work rules.

[11] Sec. 8(c) provides that the expression of any views, argument, or opinion may not "constitute *or be evidence of* an unfair labor practice . . . if such expression contains no threat of reprisal or promise of benefit." (Emphasis added.)

impasse on July 5, for essentially the same reasons as in the case involving Royal's negotiations with the Machinists. Thus, the judge found that the parties had adequate time to discuss the issues but nevertheless failed to reach an agreement because of the Machinists' unwillingness to accept flat rate. The judge discredited testimony by Machinists representatives that they were willing to bargain over flat rate, and found that German had timely responded to all information requests and that its independent violations of Section 8(a)(1) were not causally related to the deadlock in bargaining so as to preclude a lawful impasse.

The majority reverses the judge, finding that the Machinists' statements at the bargaining table and their proposal concerning flat rate on June 30 demonstrate that the Machinists were willing to agree to flat rate provided certain concerns were addressed. According to the majority, the Machinists' many contrary statements were mere posturing, and should not be taken at face value.[12] The majority also finds that the parties were not at impasse because the Machinists needed more time to review information requested late in the negotiations (and timely provided by German) and because of certain unfair labor practices committed by German away from the table.

Contrary to the majority, German and the Machinists were at lawful impasse as found by the judge. As was the case with the Machinists' negotiations with Royal, the record is replete with evidence that the Machinists were firmly opposed to flat rate and would not agree to its use by German—just as they were opposed to its use by any other employer in all of their negotiations prior to the summer of 1989. In particular, as noted above, on June 14, Day stated that German was not really interested in flat rate but was trying to provoke a labor dispute to "bust" the union, that the Machinists' settlements with other employers had not included flat rate, and that they hoped to get state legislation banning flat rate. Day also stated that none of the settlements which the Machinists had recently reached with Contra Costa auto dealers included flat rate because the employees were not interested in flat rate. Day's message was clear: no agreement would be forthcoming as long as flat rate was on the table. In light of these statements, the judge found that the Machinists' subsequent statement that they now were willing to bargain over flat rate "is not to be taken at face value." Unlike the majority, I would adopt this credibility resolution.[13]

The Machinists' unwillingness to agree to flat rate is further demonstrated by the Union's delaying tactics, which mirror those employed by the Union in its negotiations with Royal.[14] Thus, although German submitted its first proposal to the Machinists on May 5, and the parties' agreement expired in less than two months, the Machinists unjustifiably had no proposal of their own prepared at that time.[15] Subsequently, although the Machinists frequently expressed a general willingness to bargain over flat rate—but only if all of the other "takeaways" were taken off the table—whenever the parties turned to the flat-rate issue the Machinists either stated their complete refusal to accept flat rate or made regressive proposals that could only have the effect of forestalling agreement. The Machinists also indulged in frivolous information requests, including a June 30 request for lists of all tools owned by German and filing cabinets full of copies of all past work orders—information of no apparent value to the Machinists in the ongoing negotiations.[16] This impression finds support in the judge's description of the Machinists' representatives laughing and joking to each other as they made the information requests. The fact that the requests were made so late in the process, on the expiration date of the prior agreement, is also troublesome, and suggests that the information was sought solely for the purpose of forestalling an impasse declaration.[17]

Contrary to the majority, the Machinists' June 30 "flat-rate" proposal does not show that the Machinists had abandoned their prior refusal to accept flat rate, but instead further demonstrates the Machinists' intransigence on this issue. The Machinists' proposal, submitted on the very day the prior agreement expired, called for a minimum wage rate of $24.50 per hour with a guarantee of 40 hours per week (a 25-percent increase over the wage rate under the expiring agreement), and formation

[12] The majority also indulges in gratuitous speculation concerning German's motives for proposing flat rate, a question which they concede is not relevant to the issue before us.

[13] As discussed above, the majority's willingness to accept at face value the Machinists' 11th hour statements that they would agree to flat rate is curious, at best, in light of their finding, contrary to the judge, that the Machinists' many earlier statements that they would never do so were mere posturing.

[14] As noted above, the Machinists made proposals jointly to the three employers involved in this case while refusing to accept employer proposals in return on a joint basis or to engage in coordinated bargaining. The striking similarity between the Machinists' tactics and course of conduct with Royal and German further demonstrates that their purpose in doing so was to delay negotiations rather than to reach an agreement.

[15] The majority asserts that the parties agreed that the purpose of the May 5 meeting was to establish negotiating ground rules. I find this alleged justification insufficient, inasmuch as German plainly was able to, and did, tender a proposal at that meeting.

[16] The majority terms these filing cabinets "critical flat rate information." Certainly the majority does not explain how, after analyzing this information, the Machinists would have changed their long-standing, steadfast, and vehement opposition to any form of flat rate. The majority also fails to adequately address the judge's finding that, when provided with the information they had requested, the Machinists failed to examine much of the material and intentionally rearranged the rest so that it would be of no use to German. Under these circumstances, there is no basis for finding that German would have enhanced the prospects for agreement by affording the Machinists more time to "analyze" the information it had received.

[17] As previously noted, the delays in negotiations placed economic pressure on the employees to agree to the Unions' positions.

of a committee with two Machinists representatives and one German representative to resolve flat-rate disputes.[18]

This proposal, properly termed regressive by German, demonstrated that the parties were moving further apart, not closer together, as the majority would have it. Thus, the proposal guaranteed unit employees a 25-percent higher weekly wage than they received under the old contract, regardless of their efficiency, and called for the Machinists themselves (through their majority on the proposed dispute resolution committee) to make the critical determination concerning the number of hours to be allotted to a job. By providing for a 40-hour guarantee at a substantially higher base wage rate than existed under the expired agreement, the proposal effectively eviscerated any concept of flat rate and could not have been proffered with any serious expectation of reaching an agreement. Thus, the majority's finding that this proposal demonstrates that the Machinists were willing to move from their prior position opposing flat rate is completely implausible.[19]

Finally, there is no merit to the majority's conclusion that German's independent violations of the Act tainted its declaration of impasse. I agree with the majority that German violated the Act by owner Schmidt's statement to employee Torres that he should find a union job elsewhere, by his statement to employee Help about replacing the Union's pension plan with a 401(k) plan, and by German's unilateral provision of free parking to all of its employees. However, these isolated unfair labor practices have not been shown to have affected the course of the parties' negotiations and any impact which they may have had is in any event outweighed by the other evidence, cited above, which demonstrates that the Machinists had no intention of ever agreeing to flat rate.

3. German Motors—Painters

German declared impasse in its negotiations with the Painters on July 5, after six bargaining sessions, and unilaterally implemented its final proposal. The judge found that the parties were at impasse on July 5, based on clear evidence that the parties were in complete disagreement on the critical issue of flat rate. The judge also found that the Painters had engaged in nonserious and dilatory bargaining, including changing representatives at the parties' June 29 bargaining session, the day before the contract was to expire and nearly 2 months after negotiations had commenced. The judge found unworthy of credence statements by the Painters that they would accept flat rate in principle but would not accept German's flat-rate proposal. He noted that the Painters made no proposal consistent with their stated position until June 29, and that that proposal, if not a complete sham, did not show substantial movement toward German's position. The judge also noted that the Painters refused, without valid reasons, to meet between June 29 and July 6 despite the fact that the 1986–1989 agreement expired June 30 and German had announced its intent to take economic action no later than July 5.

The majority, reversing the judge, accepts at face value the Painters' statement that late in the negotiations they decided that they were willing to accept flat rate and that their proposal of June 29, accordingly, was genuine. The majority also concludes that the Painters did not delay bargaining by changing negotiators for the June 29 bargaining session, as their new representative was familiar with the issues and fully prepared to bargain. The majority also finds that the Painters had insufficient time prior to the declaration of impasse to review information which they had requested late in the negotiations.

Contrary to the majority, German and the Painters reached lawful impasse as found by the judge. Like the Machinists, the Painters had demonstrated a longstanding opposition to flat rate by the time negotiations commenced on May 5. Indeed, attorney David Rosenfeld, who represented the Painters during the final stages of the negotiations, conceded at the hearing that prior to June 29 the Painters had taken a strong position against flat rate.

Although Rosenfeld, on behalf of the Painters, stated on June 29 that the union had no philosophical opposition to flat rate [any more], the judge discredited these expressions of flexibility.[20] Unlike my colleagues, I would adopt the judge's credibility finding.

Accordingly, there is no basis for finding that the Painters' July 5 proposal on flat rate demonstrated flexibility on the part of the Union. Moreover, the Painters' inexplicable delay in making the proposal undercuts the majority's claim that it demonstrates that the parties were not deadlocked. Notwithstanding German's announcement that it was at final position and intended to implement its final offer on July 5, the Painters waited until that day to **mail** the proposal, thus insuring that it would not be received until after the implementation had taken

[18] As an alternative to this proposed committee, the Machinists' proposal called for some other, but unspecified form of binding grievance arbitration over these issues.

[19] The majority is equally wrong when it relies on information requests and bargaining proposals on matters, like benefits, which are unrelated to the central flat rate issue. They accept, at face value, the Machinists' self-serving claim that if those matters had been resolved, they would have been willing to bargain over flat rate. However, the Machinists' actual conduct shows that when the parties turned to the flat-rate issue they either stated their complete refusal to accept flat rate or made regressive proposals that could only have the effect of forestalling agreement. As noted above, flat rate was the central issue in these negotiations and the parties' impasse on the issue precluded agreement generally.

[20] The judge noted that Painters' representatives Van Zevern and Rosenfeld offered inconsistent stories concerning the status of their communications with the unit employees on the subject of flat rate, and that Rosenfeld refused to make an offer on flat rate on June 29 on the grounds that the employees had not been told that a flat rate proposal was coming, but subsequently made such an offer on July 5 without any such communication having taken place.

place.[21] As the judge recognized, there was no valid basis for the Painters' delay.

Nor was this the only instance in which the Painters attempted to preclude effective negotiations through dilatory tactics and nonserious bargaining.[22] Like the other unions involved in this proceeding, the Painters did not have any bargaining proposals ready at the parties' first meeting, in this case on May 5, despite the impending expiration of their 1986–1989 agreement.[23] As the judge found, there was no valid explanation for the Painters' decision to change bargaining representatives during the course of negotiations. In addition, wholly apart from the Painters' delay from June 29 until July 5 (really July 7) in making their much-touted flat-rate proposal, the Painters refused to meet on any dates between June 29 and July 5 despite German's offer to meet on any of those dates. In agreement with the judge, I find that attorney Rosenfeld's reasons for refusing to meet are spurious and demonstrate a lack of intent to reach agreement on the part of the Union.[24]

Finally, I find no basis for concluding, as my colleagues do, that there was no impasse because the Painters needed more time to evaluate information which they had requested—and timely received—from German. Much of the information cited by the majority deals with issues other than flat rate. As noted above, the parties' disagreement on flat rate was the cause of their inability to agree generally; as such, the status of bargaining on issues related to other issues, and information related to them, is irrelevant. The remaining information cited by the majority consists of repair orders, time cards, employee efficiency estimates, and information on come backs for the preceding 2 years. The majority accepts at face value the Painters' June 29 claim that they needed this information in order to evaluate German's flat-rate proposal.[25] Given the Painters' delay until late in the negotiations to make the request, and the judge's credibility finding that the Painters' supposed flexibility was not sincere, I cannot conclude that the amount of time afforded the Union to review this information had any effect on the prospects for agreement in this case.

[21] German received the proposal on July 7.

[22] As previously noted, the delays in negotiations placed economic pressure on the employees to agree to the Unions' positions.

[23] The majority asserts that the parties agreed that the purpose of the May 5 meeting was to establish negotiating ground rules. I find this alleged justification insufficient, inasmuch as German plainly was able to, and did, tender a proposal at that meeting. The Painters submitted their first proposal on May 16.

[24] Rosenfeld testified that he refused to meet on June 30 because he was busy in Stockton, on July 1 because he was taking his daughter to the ballet, on July 2 because he was "busy," and July 3 because he was busy with an arbitration and negotiations, and on July 4 because it was a holiday.

[25] There is no explanation for the Painters' delay until June 29 in requesting the information—when the proposal the Union purportedly intended to evaluate had been on the table for weeks.

In sum, the Painters' overall course of conduct indicates: (1) opposition to flat rate; and (2) a desire and intent to delay negotiations for the purpose of avoiding a declaration of impasse. In agreement with the majority, I note that there are no unfair labor practices here which could have precluded a valid impasse, and that there is no allegation of bad-faith bargaining on the part of German. Under these circumstances, I agree with the judge that the parties had reached lawful impasse in their negotiations at the time German implemented its final proposal.

4. Honda—Teamsters

Honda declared impasse in its negotiations with the Teamsters on August 9, after five bargaining sessions.[26] The judge found that the parties were at impasse on August 7. Initially, the judge noted that the General Counsel had not alleged any preimpasse unfair labor practices with respect to this bargaining unit. He found that Honda presented "convincing" evidence that the parties were at impasse, and that the Teamsters had unreasonably delayed bargaining through various dilatory tactics including having the parties evicted from their meeting place for the final August 7 bargaining session. Although recognizing that the Teamsters had expressed—at the final bargaining session on August 7—willingness to agree on the **concept** of commission for parts employees (which Honda had proposed), the judge noted that the value of such a "concession" is limited when it is tendered at the 11th hour without an accompanying concrete proposal. The judge also found that any such concessions, "such as they were, were based implicitly or explicitly on a trade-off of reaching agreement on other issues such as pension, wages (commission) and health and welfare on which Honda was entitled to stand fast."

The majority, reversing the judge, finds that the parties were not at impasse at the time of Honda's implementation of its final proposal. In essence, the majority finds that the parties bargained only briefly prior to a mutually agreed-upon hiatus in negotiations from June 16 to July 14 (which included an extension of the collective bargaining agreement through July 31), and that following the extension Honda pressed too rapidly for proposals from the Teamsters, and declared impasse prematurely without affording the Teamsters an adequate opportunity to evaluate information they had requested from Honda and without allowing an adequate opportunity for bargaining to take place.

Contrary to the majority, the judge correctly found that the parties had reached impasse on August 7. The record evidence in this case shows a concerted effort by Honda to reach agreement over the course of more than 3 months of ultimately fruitless negotiations. In contrast to the other negotiations discussed herein, flat-rate compen-

[26] The Teamsters represented two bargaining units at Honda: parts, and service.

sation was not an issue between the parties. Rather, the principal issue in the negotiations was Honda's proposal to substitute its own pension and benefit plans for the jointly trusted Teamsters plans which existed under the terms of the parties' 1986–1989 agreement. Although Honda was willing to and did make concessions in other areas during the course of negotiations (including agreement to put the Teamsters Health and Welfare Plan back on the table), it was adamant about withdrawing from the Teamsters Pension Fund.[27]

The Teamsters were equally adamant that they would never agree to Honda's proposal on pensions. Thus, the Teamsters consistently identified the pension issue as one of the key issues dividing the parties at the various negotiating sessions. They consistently sought to retain the Teamsters Pension Fund in all of their counterproposals. Teamsters Business Agent Powell stated that pension was the major issue at a union meeting during the negotiations at which employees voted unanimously to strike in support of the Teamsters' bargaining demands. My colleagues fail to acknowledge the gulf which separated the parties on this subject throughout the negotiations.

The majority also fails to give proper weight to the delaying tactics employed by the Teamsters in an effort to prolong negotiations and avoid a declaration of impasse. For example, the Teamsters were either unwilling or unable to formulate bargaining proposals in time for the parties' first meeting on May 5.[28] Likewise, despite the salience of the pension issue, the Teamsters made no effort to arrange a meeting with the Wyatt and Company, Honda's proposed new pension administrator, until August 9 despite the offer of many earlier dates, all of which the Teamsters rejected out of hand.[29] The Teamsters also refused without justification Honda's offers to meet on various dates between July 14 and August 7; August 7 was the first date that the Teamsters would agree on. Finally, as the judge found, the Teamsters without justification engineered the eviction of the parties from their August 7 negotiations after taking up most of the time set aside for negotiations with a line-by-line review of the Teamsters' proposal (including sections the parties had agreed to or that had been on the table since the start of negotiations)—conduct which I would find to be inconsistent with an intent to reach agreement.

The judge found that, especially under these circumstances, the Teamsters' August 7 proposal accepting commission pay for parts employees was merely an 11th hour attempt to stave off impasse rather than sincere movement. I would adopt this finding. The parties' agreement, as extended, had expired on July 31. On August 2, Boltuch wrote the employers that unless **they** changed their positions, "I envision that the differences in our positions will be determined by the National Labor Relations [Board] and/or economic action by the employees." Under these circumstances, the Teamsters' contention that there remained significant flexibility in their position is unworthy of the credence my colleagues afford it.[30]

In light of the foregoing, and considering the absence of any allegations of unfair labor practices away from the bargaining table or any allegation of bad-faith bargaining on the part of the employer or failure to provide requested information, I find that the parties were at lawful impasse by August 7.

C. Withdrawal of Recognition

Contrary to my colleagues, I would find that Respondent German lawfully withdrew recognition from the Painters.[31] Thus, German implemented its merit wage proposal on July 5. At that time, there were no other unremedied unfair labor practices. On December 15, following its receipt of a facially valid decertification petition, German withdrew recognition from the Painters.

---

[27] The judge discredited testimony by Teamsters negotiator Boltuch that Honda had agreed to take its pension proposal off the table in a telephone conversation on June 27.

[28] Honda presented a full, written proposal at that meeting, which was revised several times in the course of negotiations to reflect concessions by Honda.

[29] The majority finds, contrary to the judge, that the Teamsters' delay in arranging a meeting with Wyatt from June 14 through July 14 was excused by the contract extension agreed to by the parties and a consequent bargaining hiatus. However, Boltuch testified that he did not seek a meeting with Wyatt during this period because Honda negotiator Hulteng told him on June 27 that its pension proposal was off the table. The judge specifically discredited Boltuch's explanation for the delay. In these circumstances, I find that the delay was unjustified.

I also find that there is no justification for the Teamsters' delay from July 14 to August 9 in arranging a meeting with Wyatt. Thus, the majority acknowledges that Honda offered several dates from late July through early August promptly after the Teamsters' letter dated July 24 requesting that a meeting be arranged. While the Teamsters offered many explanations for their inability to meet prior to August 9, I find that these explanations do not justify the delay in light of the supposed importance of this information to the Teamsters' ability to bargain. I further note that the alleged inability to meet here until a date subsequent to the expiration date of the parties' agreements is consistent with the pattern established by these unions throughout the course of these negotiations. Like the judge, I am skeptical of the bona fides of the unions' explanations for these delays.

[30] Accordingly, I find no basis for my colleagues' position that the Teamsters' had been afforded insufficient time to evaluate relevant information provided by Honda; any additional time would not affect the fact that, by August 7, the prospects for agreement were nil.

[31] As noted elsewhere, I join my colleagues in finding that Respondents Royal and German violated Sec. 8(a)(5) by implementing wage proposals which reserved to the employers an impermissibly broad range of discretion over rates of pay for unit employees. I also join my colleagues in finding, in agreement with the judge, that German was not at lawful impasse in its negotiations with the Teamsters at the time it unilaterally implemented its final proposal and committed certain other unfair labor practices which affected the course of those parties' negotiations. Solely on the basis of these violations, I join my colleagues in finding that Respondent Royal unlawfully withdrew recognition from the Machinists, and that Respondent German unlawfully withdrew recognition from the Machinists and Teamsters.

The Board has found that an employer may withdraw recognition based on evidence that a union either in fact is no longer the majority representative or where the employer has a reasonably based doubt, based on objective considerations as to the union's continued majority status. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), enf. denied on other grounds 117 F.3d 1454 (D.C. Cir. 1997). While the Board has also held that the withdrawal of recognition must occur in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, the Board has recognized that not every unfair labor practice will taint evidence of a union's subsequent loss of support. Id. Thus, where, as here, there is no allegation of a general refusal to bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing loss of majority support. Id. Factors which the Board considers in this context include: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on the employees' morale, organizational activities, and membership in the union. See *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995) (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Applying these principles, I find that the General Counsel has not established that German's unlawful implementation of the merit wage proposal, on July 5, tainted the decertification petition which German received nearly 6 months later, on December 15. The record is silent concerning the reasons for this delay, and there has been no showing that this single unfair labor practice had any relationship to the union's loss of majority support. The significant passage of time between the two events suggests that it did not. Accordingly, I would find that German did not violate the Act by withdrawing recognition from the Painters.

D. Lockout

The majority finds that Respondents German and Honda unlawfully locked out unit employees on July 3 and August 7, respectively. The judge dismissed these allegations because they are derivative of the allegations that the parties had not reached lawful impasse, which the judge also dismissed. For the reasons stated above, I would adopt the judge's findings that German and Honda reached lawful impasse in their negotiations. Accordingly, I would also find that the lockouts were a lawful effort by the employers to bring economic pressure to bear in support of a legitimate bargaining position. See *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). I therefore do not pass on the Respondents' alternative contention that the lockouts were privileged by the terms of their collective bargaining agreements. I also find it unnecessary otherwise to pass on the majority's discussion of *American Ship Building Co.* and the circumstances in which an employer may lock out employees during negotiations of a collective bargaining agreement.

CONCLUSION

As indicated above, Royal and German both committed certain violations of the Act in connection with the 1989 negotiations with unions representing their employees. I do not condone these violations, and join my colleagues in ordering an appropriate remedy for the violations established on this record. Apart from the violations so established, this case involves nothing more than a test of economic strength, more than 10 years ago, between the auto dealers and the unions.[32] I do not dispute the unions' right under the law to disagree with the employers' proposals, and to use lawful means to press their own position concerning terms and conditions of employment for bargaining unit employees. The majority, however, appears unwilling to accept that the employers enjoyed a like right to press their position during the course of these contentious negotiations, and to declare impasse once the possibility of agreement was exhausted. Uncomfortable with the lawful results of the unions' ill-fated efforts to oppose the employers on the issue of flat rate, my colleagues substitute their analysis for the judge's and thereby undo through the Board's processes the defeat the unions suffered at the bargaining table.

At the heart of the majority's new "analysis" lie three serious and reprehensible errors. First, they label any union statement which suggests a resolute and uncompromising opposition to flat-rate systems as "posturing" while labeling the unions' last minute statements of professed interest in flat rate as "genuine." They engage in this one-sided labeling without sharing with the parties or reviewing court the magic formula by which they, reading from a cold record and in utter disregard for the judge's contrary findings, could discern these underlying motivations.

Second, and contrary to all our rules, they cavalierly override the judge's credibility resolutions regarding the genuineness of the unions' last minute proffers. Thus, what the judge properly, and based at least in part on his assessment of the credibility of the witnesses who testified before him, called "not to be taken at face value" and "non-serious bargaining," not designed to narrow

[32] At least in the circumstances of this case, I agree with the majority that the Board's delay in issuing this decision is not a basis for refraining from remedying violations that have been established, and I have joined my colleagues in providing that remedy. However, when the issue is as fact-intensive as whether the parties were at impasse, and the judge, writing much more closely in time to the events in question and with the benefit of hearing directly from the participants, has ably analyzed those facts, I believe that the Board should refrain from second-guessing the judge.

negotiations but to delay them, the majority, by some hidden alchemy, transmutes into genuine bargaining proposals, thereby purporting to turn clear impasses into situations fraught with creative negotiating opportunities.

Third, they seize on each last minute information request, no matter how irrelevant to the negotiations, and regardless of the laughing and snickering which accompanied its delivery, to justify their unfounded conclusions. With practice, Lewis Caroll's White Queen could imagine as many as six impossible things before breakfast,[33] but even she would be hard put to deny the existence of an impasse on the basis of the record before us. I, therefore, dissent.

APPENDIX 1

(ROYAL)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally implement our final offer to the Machinists Union without first bargaining to impasse nor otherwise refuse to bargain in good faith in the following appropriate unit:

All full-time and regular part-time employees employed by Respondent Royal Motor Sales whose job classifications were covered by the 1986–1989 collective bargaining agreement between Royal Motor Sales and the Machinists Union excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT implement impermissibly broad merit wage proposals to the Machinists without offering to bargain with the Union, as the representative of the unit employees, about the procedures and criteria relevant to those provisions.

WE WILL NOT attempt to withdraw recognition from the Machinists unit and Teamsters service and parts units when we do not doubt in good faith the Machinists' and the Teamsters' majority status.

WE WILL NOT tell employees they could make more money under a flat-rate system of wages if the Union were not there.

WE WILL NOT tell employees that employees who were going to stay in our employ were going to be nonunion or be replaced.

WE WILL NOT tell employees that it was useless to wear a union hat because there was not going to be a union anymore.

WE WILL NOT ask employees to sign a decertification-like petition and offer employees a bonus to sign.

WE WILL NOT directly deal with employees over wages then being negotiated by telling employees that they could make more money under a flat-rate system of wages if the Union were not there.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of their rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unilateral changes we made in the terms and conditions of employment.

WE WILL, on request, bargain in good faith, with the Machinists concerning wages, hours and other terms and conditions of employment.

WE WILL make whole employees in the above-defined collective-bargaining units for unpaid wages, and unpaid holiday and vacation benefits, with interest, as provided in the decision of the National Labor Relations Board.

WE WILL reimburse employees, where applicable, for any and all losses sustained by reason of a loss of eligibility for health and welfare benefits caused by our unlawful unilateral suspension of contributions, with interest, as set forth in the decision of the National Labor Relations Board.

WE WILL reimburse all Machinists Trust funds, where applicable for unpaid contributions as set forth in the decision of the National Labor Relations Board.

ANDERSON ENTERPRISES D/B/A
ROYAL MOTORS SALES

APPENDIX 2

(GERMAN)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

[33] Lewis Carroll, *Alice's Adventures in Wonderland* and *Through the Looking Glass* at 174 (New Signet Library, 1960).

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally implement our final offer to the Machinists, Teamsters, and Painters Unions without first bargaining to impasse, nor otherwise refuse to bargain in good faith in the following appropriate units:

All employees covered by the 1986–1989 collective-bargaining agreement between Respondent German Motors Corporation and the Machinists Union; excluding all other employees, guards, and supervisors as defined in the Act.

All full-time and regular part-time employees employed by German Motors Corporation whose job classifications were covered by the 1986–1989 Parts agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.

All full-time and regular part-time employees employed by German Motors Corporation whose job classifications were covered by the 1986–1989 Service agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.

All employees covered by the 1986–1989 collective-bargaining agreement between Respondent German Motors Corporation and the Painters Union; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT implement impermissibly broad merit wage proposals to the Machinists, Teamsters, and Painters Unions without offering to bargain with the Unions, as the representatives of the unit employees, about the procedures and criteria relevant to those proposals.

WE WILL NOT attempt to withdraw recognition from the Machinists, Teamsters, and Painters Unions when we do not doubt in good faith the Unions' majority status.

WE WILL NOT tell employees they would be better off without the Union.

WE WILL NOT tell employees if they didn't like to work in a nonunion setting they could find a job elsewhere.

WE WILL NOT tell employees they could make more money under a flat-rate system.

WE WILL NOT tell employees that a benefit plan was not available to employees who were in the Union and that this is a time for no unions.

WE WILL NOT deal directly with bargaining unit employees.

WE WILL NOT make unilateral changes in terms and conditions of employment without bargaining in good faith to agreement or impasse.

WE WILL NOT lock out our employees in retaliation for their union and protected concerted activities or in support of an unlawful bargaining position.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unilateral changes we made in the terms and conditions of employment.

WE WILL, on request, bargain in good faith, with the Machinists, Teamsters, and Painters Unions concerning wages, hours and other terms and conditions of employment.

WE WILL make whole employees in the above-defined collective-bargaining units for unpaid wages, and unpaid holiday and vacation benefits, with interest, as provided in the decision of the National Labor Relations Board.

WE WILL reimburse employees, where applicable, for any and all losses sustained by reason of a loss of eligibility for health and welfare benefits caused by our suspension of contributions, with interest, as set forth in the decision of the National Labor Relations Board.

WE WILL reimburse all Machinists, Teamsters, and Painters Trust funds, where applicable for unpaid contributions, as set forth in the decision of the National Labor Relations Board.

GERMAN MOTORS CORP.

APPENDIX 3

(HONDA)

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally implement our final offer to the Teamsters Union without first bargaining to impasse, nor otherwise refuse to bargain in good faith in the following appropriate units:

All full-time and regular part-time employees employed by Respondent San Francisco Honda whose job classifications were covered by the 1986–1989 Parts agreement between the Teamsters and San Francisco Honda, excluding office clerical employees, guards, and supervisors as defined in the Act.

All full-time and regular part-time employees employed by Respondent San Francisco Honda whose job classifications were covered by the 1986–1989 Service agreement between the Teamsters and San Francisco Honda, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT lock out bargaining unit employees in retaliation for their union and protected concerted activities or in support of an unlawful bargaining position.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unilateral changes we made in the terms and conditions of employment.

WE WILL, on request, bargain in good faith, with the Teamsters concerning wages, hours and other terms and conditions of employment.

WE WILL make whole employees in the above-defined collective bargaining units for unpaid wages, and unpaid holiday and vacation benefits, with interest, as provided in the decision of the National Labor Relations Board.

WE WILL reimburse employees, where applicable, for any and all losses sustained by reason of a loss of eligibility for health and welfare benefits caused by our unilateral suspension of contributions, with interest, as set forth in the decision of the National Labor Relations Board.

WE WILL reimburse all Teamsters Trust funds, where applicable for unpaid contributions, as set forth in the decision of the National Labor Relations Board.

SAN FRANCISCO HONDA

Jonathan J. Seagle, Esq., and *Lucile L. Rosen, Esq.,* for the General Counsel.

Robert G. Hulteng, Esq., Elizabeth A. Franklin, Esq., Philip E. Drysdale, Esq., and *Robert Leinwand, Esq*., for the Respondents.

Paul Supton, Esq., of San Francisco, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried in San Francisco, California, on 30 hearing days between July 20, 1992, and February 11, 1993,[1] pursuant to various complaints, consolidated complaints, and amendments to complaints all issued by the Regional Director for the National Labor Relations Board for Region 20 on July 31, 1990 (20–CA–22989, 20–CA–23292), December 31, 1990 (20–CA–23048), January 3, 1991 (20–CA–23045, 20–CA–23064), March 28, 1991 (20–CA–23047), March 11, 1992 (20–CA–23045 amended), June 19, 1992 (20–CA–23046, 20–CA–23049) and which are based on charges filed by Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO (Teamsters) (20–CA–22989, 20–CA–23292); Teamsters (20–CA–23048); Automotive Machinists Local Lodge 1305 and Machinists Automotive Trades District Lodge No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO (Machinists) (20–CA–23045); Auto, Marine and Specialty Painters Union, Local 1176 (Painters) (20–CA–23064); Machinists (20–CA–23047); Machinists (20–CA–23046); and Teamsters (20–CA–23049) on November 9 (20–CA–22989), first amended on July 12, 1990; on April 12, 1990 (20–CA–23292); first amended on July 9, 1990; on December 14 (20–CA–23048); on December 14 (20–CA–23045); on December 21 (20–CA–23064); on December 14 (20–CA–23047); and on December 14 (20–CA–23046 and 20–CA–23049). The complaints allege that Royal Motor Sales, German Motors Corporation, and San Francisco Honda (Respondents or Royal, German, or Honda) have engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Principal Issues

Whether any of the Respondents or all of them engaged in any of the following activities, and if so, whether the activities violated the Act:

1. During the course of negotiations to reach new labor agreements, implementing final offers when the parties were not at impasse;
2. Making certain unilateral changes without notice to the Unions and in one instance, discharging an employee pursuant to disciplinary rules changed unilaterally by a Respondent;
3. Withdrawing recognition from one or more unions as the exclusive collective-bargaining representative of certain employee units;
4. Acting through certain managers or supervisors, making statements to unit employees, the effect of which was to coerce employees in the exercise of their rights protected by Section 7 of the Act or, to undermine the unions;
5. Bypassing the Unions and dealing directly with unit employees, with respect to certain mandatory subjects of bargaining;
6. Locking out employees represented by a union;
7. Causing or prolonging a strike by commission of one or more unfair labor practices;
8. Failing to provide to one or more unions on a timely basis, or not providing at all, certain requested information necessary for the unions to perform their functions.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondents.[2]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

[1] All dates refer to 1989 unless otherwise indicated.

[2] By letter of July 6, 1993, submitted to me, Attorney Supton on behalf of Charging Parties joined in the two briefs submitted by counsels for the General Counsel.

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondents admit that they are all California corporations, that they all operate businesses for the retail sale and service of automobiles, and that they all maintain places of business in San Francisco, California. They further admit that during the past year, in the course and conduct of their businesses, that their gross volumes exceeded $500,000 and that during the same period they purchased and received goods and materials valued in excess of $1500 which originated directly from points outside the State of California. Accordingly, they admit, and I find, that they are employers engaged in commerce and operate businesses affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents admit, and I find, that Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO; Automotive Machinists Local Lodge 1305 and Machinists Automotive Trades District Lodge No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO; and Auto, Marine and Specialty Painters Union, Local 1176 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Miscellaneous Matters[3]

1. The advocate as witness

Respondents were represented during the hearing by attorneys Hulteng, Franklin and Drysdale, each one of whom was also a major witness. Moreover, the conduct of two, Hulteng and Franklin, during the extensive negotiations, was in direct issue, with respect to the impasse allegations. So they were in the position of having to defend their client's interests and their own interests as agents of the clients. While the Board has decided that such conduct by attorney witnesses is not improper, I ask whether in a case like that at bar, the Board should reconsider its prior rulings due to the potential for attorney conflict of interest.

In its most recent pronouncement on the subject, the Board stated, *Page Litho*, 311 NLRB 881 fn. 1 (1993), that it disagreed with the administrative law judge's view that the Respondent's counsel was precluded ethically from appearing as a witness. As authority for the holding in *Page Litho*, the Board cited *Wells Fargo Armored Service Corp*., 290 NLRB 872, 873 fn. 3 (1988), in which the Board explained "it is not the Board's function or responsibility to pass on the ethical propriety of a decision by counsel to testify in an NLRB hearing. Where the testimony is otherwise proper and competent, it should be admitted into evidence. *Operating Engineers Local 9 (Fountain Sand),* 210 NLRB 129 fn. 1 (1979)." See also *Airport Service Lines*, 231 NLRB 1272, 1279 (1977).

Of course, I am bound by the Board's view of the law and because Respondents' attorneys' testimony was otherwise proper, I permitted them to testify over Charging Parties' objections. However, I note that in *Kay v. Bremer Ehrler & Kentucky Board of Elections*, 499 U.S., 111 S.Ct. 1435, 1438 (1991), the Court noted that "Ethical considerations may make it inappropriate for [an attorney representing himself] to appear as a witness," citing at footnote 9 of the Court's decision, the *ABA Model Code of Professional Responsibility* (1977), which describes the potential conflict:

> The roles of an advocate and of a witness are inconsistent; the function of an adovcate is to advance or argue the cause of another; while that of a witness is to state facts objectively. E.C. 5.9

As I read the decision of the Supreme Court in *Bremer Ehler & Kentucky Board of Elections*, the Court's view is not necessarily at odds with that of the Board's, although some courts have decided flatly that an attorney cannot be both an advocate and a witness. See, e.g., *U.S. v. Clancy*, 276 F.2d 617, 636 (7th Cir. 1960). In this decision I recite those factors which are not necessarily present in all cases and which may convince the Board to modify its rule allowing each advocate to decide for himself or herself whether ethical considerations should preclude him or her from also becoming a witness.

On the first day of hearing, Charging Parties moved for sequestration of witnesses, a motion I granted pursuant to the Board's decision in *Unga Painting Corp*., 237 NLRB 1306 (1978). Thereafter, Charging Parties complained repeatedly that allowing all of Respondents' attorneys to be witnesses violated the letter and spirit of the sequestration rule. I overruled the objections finding that I had no authority to exclude from the hearing, Respondents' attorneys of record merely because they were all going to be future witnesses.[4]

Another recurring problem in the instant case concerned the attorney-client privilege and implied waiver for cross-examination purposes. While this issue presents itself for all attorney-witnesses, whether or not representing a party, it arose on a regular basis in the instant case.

Finally, as already mentioned, when the advocate witness' own conduct is in direct issue, as it is here, the Board may see fit to modify its aforementioned rule.[5] With the greatest respect, I propose that when an attorney knows in advance of hearing or reasonably should know, that his conduct constitutes an essential and significant issue in the case, thereby requiring his tes-

[3] The original court reporting service was replaced for contractual reasons in approximately midcase. Several volumes of transcript prepared by the original court reporting service were mispaginated with gaps and page number duplications. The second court reporting service provided transcripts of such poor quality, their unskilled work must be noted for the record. Moreover, some of the court reporters assigned by the second court reporting service did not appear to be competent to perform their duties and this resulted in delay and confusion during the hearing. Finally, several items of evidence were lost by one or both services: CP Exhs. 1, 2, 16–19, and R. Exhs. N-1A–52A, I-1-I-49, I-50, N-14, 36, 51, 88, and C-152 (prime) to C-283 (prime) were never received. In an attempt to locate the missing exhibits, I sent letters to both court reporters: The first wrote back denying responsibility for any missing exhibits; the second did not see fit to reply to my inquiry. Ultimately both Charging Parties and Respondents supplied copies of missing exhibits at their own expense. I recommend that the Board investigate the allegations recited herein and if found to be valid, some manner be formed to make whole Charging Parties and Respondents.

[4] In candor, given the context of this case, particularly with the volume of contemporaneous notes taken during the negotiating sessions, if a real or apparent violation of the sequestration rule occurred, I find that Charging Parties were not prejudiced.

[5] By raising this issue on my own motion, I do not imply or suggest that Respondents' attorneys acted improperly. On the contrary, they, as did I, acted, with respect to this issue, in complete accord with the Board's existing rules.

timony, he should not also be the attorney of record during the same hearing.

2. The special appeal

At an early point in the case, Respondents indicated that they desired to offer not just their original handwritten bargaining notes, but also typed copies of the notes prepared sometime after the instant complaints were filed. Both General Counsel and Charging Parties objected to admission of both sets of notes. After extensive argument concerning the issue, I ruled that both Respondents' handwritten bargaining notes and the subsequently typed set would be admitted, subject to proof of a proper foundation.[6] Thereafter, both General Counsel and Charging Parties requested special permission from the Board to file an appeal with respect to admission of the notes. On November 30, 1992, without elaborating, the Board denied General Counsel's and Charging Parties' requests for special permission to appeal (R. Exhs. 34, 35, 36, 37).

Subsequent to the Board's ruling, Charging Parties' offered their own bargaining notes into evidence and these were received without objection (CP Exh. 20).

B. Statement of Facts

1. Overview and background

This is a case about three auto dealerships and three unions which represent certain bargaining units of employees employed by the dealerships. During 1989, the parties attempted without success, to negotiate new collective-bargaining agreements to replace those expiring at the end of June. Ultimately, the dealers declared impasse in the negotiations and implemented some or all of their last and final offers. The gist of this case challenges Respondents' declarations of impasse and disputes the behavior of the negotiators during the approximately 52 bargaining sessions. In addition, certain alleged acts of Respondents' owners, managers, and supervisors away from the bargaining table have been placed in issue. Before turning to a detailed review of each bargaining session, I recite first extensive background surrounding this controversy.

a. Royal Motors

During the time in question, Royal was primarily a Volvo dealer. According to Respondents' witness, Michael Hansen, part owner, president, and general manager of Royal, prior to 1989, Royal had not negotiated directly with the three Unions. Instead, Royal waited until the Unions reached agreement with the Northern California Motor Car Dealers Association (NCMCDA) on behalf of its member dealers. Then, although Royal was not a member of NCMCDA, without objections from the Unions, it automatically adopted the agreement reached by NCMCDA. In 1986, Royal received notice from the Teamsters that this past practice would not continue beyond the 1986–1989 collective-bargaining agreement. Accordingly, in early 1989, Hansen began to prepare for Royal's first negotiations set to begin that spring.

First, Hansen canvassed other nearby auto dealers both in San Francisco and in the Bay Area. Some of the dealers were direct competitors of Royal selling either Volvos or other automobiles designed and priced to appeal to the same customers as Volvos. A few had recently negotiated with the Machinists and/or Teamsters in unsuccessful attempts to reach new collective-bargaining agreements. Instead, these dealers such as San Francisco Auto Center, Van Ness Auto Plaza, European Motors, and Greenspan Motors had ultimately declared impasse and unilaterally implemented their final offers with the unions. These acts in turn had led in some cases to bitter and violent strikes. Moreover, after unsuccessful negotiations, unions had been voted out of some of the dealerships canvassed by Hansen. Besides talking to these dealers mentioned above and others, Hansen testified he also consulted with the executive director of NCMCDA, Jack Snow. All of these sources conveyed to Hansen certain alleged trends in collective bargaining from the employers' point of view.

Hansen described other factors which shaped his view of desirable Royal proposals for the spring: the rising popularity of Acura, Lexus and Infiniti models which compete with Volvos, and the changing demographics of San Francisco which involved the exodus from the city of middle class families, the primary source of Volvo customers.

Finally, Hansen retained the services of Hulteng, and the Littler firm. Hulteng had represented some or all of the dealerships canvassed by Hansen and several others not canvassed. For example, Hulteng, Drysdale and other Littler attorneys had represented in early 1989, a dealership called British Motors, in negotiations with Teamsters and Machinists. Like the other dealerships mentioned above, no collective-bargaining agreement was ever reached and the British Motors final proposals were implemented. From time to time during the hearing of the instant case, reference was made in testimony to British Motors as having been discussed during certain of the negotiating sessions. The British Motors implemented proposals contained a flat-rate proposal which Hansen decided he needed for Royal to remain competitive in the San Francisco auto business. In this respect, Hansen proposed to the Machinists on behalf of his mechanics and related classifications, and to the Painters, a so-called flat-rate system of employee compensation. In Hansen's view, flat-rate wages are linked to production which in turn increases overall efficiency.

The flat-rate system operates as follows: a customer brings in a car, say for replacement of brake linings. A dispatcher or service writer consults a standard manual published by the car's manufacturer or an independent company and determines that the job for that year and model car should take, say 1.5 hours. If the job takes less time, due to the skills of the mechanic, the mechanic is nonetheless paid for 1.5 hours. If the job takes more time, the mechanic must work all time over 1.5 hours without pay.

Remaining competitive by reducing Royal's costs, according to Hansen, required not only flat rate, but other changes as well in the 1989 collective-bargaining agreement to be negotiated. For example, Royal proposed changes in employee health insurance coverage requiring employees to select coverage either form the NCMCDA, which had previously been available only to nonbargaining unit employees or from Kaiser HMO. Under either coverage, Royal proposed that it would no longer pay for dependent coverage. Instead, Royal proposed to offer a new flexible benefits plan by which employees could select certain

[6] See *NLRB v. Tex-Tan, Inc*., 318 F.2d 472, 483–484 (5th Cir. 1963). While reserving the right to challenge the adequacy of the foundation for the handwritten bargaining notes, because many were authored by then summer law clerks who were not called as witnesses, General Counsel and Charging Parties did not object to foundation for the typed bargaining notes (Tr. pp. 3607–3609). As to the handwritten bargaining notes, I found adequate foundation provided by Respondents' witnesses, Hulteng, Franklin, Drysdale, and other attorney-witnesses.

options such as dependent medical coverage, child care expense, or noncovered medical costs which employees would apparently pay for out of gross income, thereby reducing their own taxable income, and of course, reducing Royal's costs as to these items to zero.[7]

Still another major change so that Royal could remain competitive involved eliminating employee pension plans. Both the Teamsters and Machinists had union pension plans requiring Royal to make substantial monthly deposits to the employees' accounts. To reduce costs, Royal proposed that its employees set up 401K plans where again, the individual employee would save a certain amount of money every month deducted from gross income, thereby reducing employee taxable income. Under this plan, Royal agreed to make deposits to the employee 401K account if and only if conditions permit. That is, Royal claimed for itself absolute discretion as to its deposit of funds to employee 401K accounts. Notwithstanding Royal's unwillingness to commit itself to a certain monthly deposit or any deposit, Hansen testified that the 401K plan was more beneficial for employees because Royal's plan was portable, i.e., it could be continued by the employee even after job changes to a nonunion employer and because a 401K plan had a more favorable vesting arrangement.[8]

b. German Motors

During the time in question, German was primarily a BMW dealer. Respondents called Henry Schmitt, now president of German, but in 1989, vice president, service manager and general manager. According to Schmitt, prior to 1989, German had not directly negotiated with the Unions; instead German adopted contracts which had been negotiated by others. Schmitt further related that German had collective-bargaining relationships with the three unions going back several years. Under the leadership of Henry Schmitt's father, Dieter Schmitt, who passed away in 1992, German apparently had generally satisfactory relationships with its unions prior to 1989. However, in early 1989, and perhaps earlier while his father was becoming increasingly incapacitated due to illness, Henry Schmitt came to believe that his father's methods of managing the business, while perhaps producing harmony in the workplace, were old fashioned and not calculated to improve the diminishing profits of German. Accordingly, Henry Schmitt decided that for the first time German would negotiate directly with its Unions in 1989 and seek changes in the labor agreements.

Like Hansen, Schmitt canvassed by phone and in person, a number of local auto dealers including other BMW dealers and competing dealers with models designed for the same niche as BMW. This would include European Motors selling Mercedes and British Motors selling Jaguars. As a result of this process, Schmitt, like Hansen, came to certain conclusions as to what German's proposals should contain.

As to flat rate, German proposed a modified version to the Machinists and Painters; that is, German's proposals contained a minimal guaranteed hourly wage. As to health insurance, German again made somewhat different proposals from Royal. It offered Kaiser HMO as had been offered under the 1986–1989 agreement, but without the "middlemen," i.e., without the Union, so that German's costs were lower. Most eligible employees had selected Kaiser but for those who wanted a different option, German offered in 1989, as it had before, a Blue Cross plan. Under the old agreements, German had paid for dependent health care. Under its final 1989 proposals, German continued to pay for dependent health care. Finally German proposed establishment of a flexible benefits plan with first Lipman and then Gene Adams & Assocs. as administrators, and offering essentially the same benefits as Royal was offering.

As to employees retirement, German proposed ending its participation in the Unions' pensions plans. In their place, German proposed a 401K plan much like what Royal had proposed, except that German offered to pay 25 cents for every dollar deposited by employees up to a certain limit. This roughly cut German's costs in half compared to the Unions' pension plans. German also proposed establishing a profit-sharing plan without committing itself to any specific amount or percentage of profits to be deposited to employee accounts.

c. San Francisco Honda

In 1937, the father of Honda's current owner opened an auto dealership in San Francisco. In 1945, Respondents' witness Roger Boas, joined his father as part owner of the dealership. Virtually from the beginning, Honda had been party to collective-bargaining agreements with the Machinists and Teamsters.[9] At some point, during the years, the dealership began to sell Honda automobiles and is currently the only Honda dealer in San Francisco.

During the 1970s and most of the 1980s, Boas did not participate in the day-to-day affairs of Honda. During all or part of this period, Boas engaged in public service for the city of San Francisco.

In formulating Honda's initial proposals, Boas followed the pattern established by Hansen and Schmitt, and canvassed other dealers to uncover current trends. As a result of this and other information which came to Boas' attention, Boas decided to include flat rate as a major part of his wage offer. As to health plan coverage, Boas planned no major changes from the Unions' plan. However, as to the retirement plans, Boas did desire major changes.

Boas testified that prior to formulating his initial proposals, he contacted Wyatt & Co., an actuarial firm. At Boas' request, Wyatt supposedly compared the Unions' pension plans to the retirement plan already established for Honda's nonunion employees. According to Boas, Wyatt found not only that the Honda pension plan was far superior to the two union plans, but incredibly, the former cost about $100 per person, while the latter cost about $250 per person.[10] After this alleged information was conveyed to Boas, he directed that the Honda pension

[7] A "cafeteria plan," is to be contrasted with a flexible benefits plan. Under the former, an employee is allotted a certain sum by the employer and the employee may spend it to pay for certain available benefits such as child care, for example.

[8] During the hearing, many references were made to Gene Adams & Associates, who is or was to be the administrator of the 401K plan and to Larry Lipman, who was to be the administrator of the flexible benefits plan. On June 1, a meeting was held with Lipman to discuss the proposed plan. Eventually, Lipman refused to perform his job as administrator though he had received fees from representatives of the Respondents (R. Exh. 53). Neither Lipman nor Adams testified in this case and I make no finding as to why Lipman resigned his job. He was replaced by Gene Adams & Associates who had recommended Lipman in the first place.

[9] Honda has no collective-bargaining relationship with the Painters.

[10] Despite this testimony, Honda negotiators told the union representatives that if any Honda bargaining unit employee was disadvantaged by the Honda pension plan, the person would be made whole.

plan be proposed to the Unions as a substitute for the Unions' plans.

On June 20, Boas hired William Boggs as his new general manager. Like Boas, Boggs testified for Respondents and related that when hired, he brought on board about 22 years of experience in the automobile dealership business. In order to give Boggs time to familiarize himself with the issues in and status of negotiations, Boas sought and received an extension in the two collective-bargaining agreements set to expire in about 10 days. In addition Boas requested through his attorneys a hiatus in bargaining while Boggs studied the issues. The Unions granted this request.

As I will recite below in greater detail, when bargaining resumed, Honda withdrew its flat-rate proposal, because, according to Boggs, "we were on a collision course and I wanted to avoid the collision" (Tr. p. 5180).[11]

d. Robert Hulteng

As noted above, Hulteng was lead negotiator, lead trial counsel and major witness at hearing. With the Littler firm since 1976, Hulteng had participated on the management side in close to 100 separate series of negotiations, of which about 30 to 40 sets have involved the automotive industry. Hulteng began to represent auto dealers in 1986 and eventually represented about 15 auto dealers, many of whom were those canvassed by the three Respondent representatives referred to above. During the course of these prior auto dealer negotiations involving many of the same issues found in the instant case, such as flat rate, Hulteng dealt with the same Unions, and all or most of the same union attorneys and business agents found in the instant case.

According to Hulteng, based on his experience as a negotiator for auto dealers, flat rate for employees doing mechanical repairs, including body work, is no longer the wave of the future, but is currently essential for the highly competitive automobile dealership doing repairs and maintenance. To this end, Hulteng conferred with his clients and assisted in formulation of proposals and bargaining strategy. The latter included Hulteng's attempt at every opportunity to achieve coordinated bargaining, as he had in 1986 while representing European Motors, San Francisco Auto Center, and Van Ness Auto Plaza, all San Francisco auto dealers in bargaining with the same unions as here. Coordinated bargaining, Hulteng opined, means more than one dealer at the table making and receiving proposals and engaging in discussions simultaneously with one or more unions.[12] In the present case, the Unions generally resisted the concept of coordinated bargaining, and Hulteng, with limited exceptions, was unable to bargain on a coordinated basis.

e. Burton Boltuch

An attorney since 1976, Burton Boltuch was the chief negotiator for the Machinists and Teamsters. Like Hulteng, Boltuch had extensive experience in the auto dealership business, except Boltuch represented labor unions. More specifically, prior to the instant negotiations, Boltuch represented various Machinists and Teamsters locals and to a lesser extent, Painters locals in the automotive industry. Some of the 1986 bargaining referred to above pitted Boltuch against Hulteng, so when the current negotiators began, each was familiar with the other. In the spring of 1989 when bargaining commenced, Boltuch was a principal in a law firm with a partner named Jonathan Siegel and an associate named Pamela Allen. Both Siegel and Allen did some bargaining on behalf of the Machinists and Teamsters unions in the present case, but only Allen testified. Boltuch's former law firm dissolved long before the hearing began.

In the instant case, Boltuch represented all three unions as negotiations began. At some point in May or June, Boltuch ceased to represent the Painters. He was replaced first by the Painters business representative, and General Counsel's witness, Mark Van Zevern. In late June, Attorney David Rosenfeld also a General Counsel's witness took over for the Painters.

As noted above, Boltuch prepared his own set of bargaining notes, as he negotiated with the dealers. Although Boltuch was frequently assisted during bargaining by one or more union business representatives or by worker committees from the various dealerships, Boltuch was apparently the only one who took notes on the union side.

Boltuch had a peculiar trait in his negotiating style. As will be recited below, from time to time, when he felt provoked by his opponents, he would react with racial, sexual, or profane remarks all directed to one of his opposite number.

2. Bargaining sessions—Royal

The bargaining got underway not with a meeting, but with an April 28 phone call between Hulteng and Boltuch to discuss format and other details. Among other matters discussed was Hulteng's desire for coordinated bargaining and Boltuch's objection to it. Boltuch noted that each union had separate contracts, indeed the Teamsters had two contracts with each dealer—one for parts and one for service employees. In addition, Boltuch stated that each contract involved different classification of employees, with different needs and concerns. Despite the parties inability to agree on a format, they did nevertheless agree on a date for the first meeting of negotiators, May 5—at Hulteng's office.

In a confirming letter sent on April 28, Boltuch wrote as follows:

> Robert Hulteng
> Littler, Mendelson, Fastiff & Tichy
> 650 California St., 20th Fl.
> San Francisco, CA 94108-2693
>
> Re: San Francisco Honda, German Motors;
> Royal Volvo
>
> Dear Mr. Hulteng:
>
> I am writing to confirm that there will be negotiations on May 5, 1989 at 4:00 p.m. at your office for each of the above three dealerships with Painters Local 1176, Teamsters Local 665, and Machinists Lodge 1414, District Lodge 190. While this opening negotiation session is being held with all three dealerships and all the Unions at

[11] In my summary of the bargaining sessions below, I will discuss other issues facing the parties in addition to the three mentioned above.

[12] As explained in I Morris, The Developing Labor Law, 666–667 (2d Ed. 1983), coordinated bargaining is more technically defined as follows:

> The terms "coalition" or "coordinated" bargaining are often used interchangeably, although there is logical difference between the terms which corresponds to the intent and nature of the mutual bargaining activity. "Coordinated" bargaining connotes communication and accommodation among different bargaining agents but *independent decision making* in separate bargaining processes. Such activity is therefore not illegal as such. "Coalition" bargaining, on the other hand, implies a de facto merger of bargaining units, or an effort to achieve that end.

one time, we are not agreeing that future negotiations will be held on any type of coordinated basis.

It is my understanding that representatives of the dealerships will be present on May 5.

It is my further understanding that you will have available on May 5 the opening proposals of each of the dealerships for each of the Unions. We are attempting to have the initial proposals of each of the Unions for each of the dealerships by May 5, but I cannot promise you that this will be completed.

Thank you.

Very truly yours,
/s/ Burton F. Boltuch
Burton F. Boltuch
[R. Exh. C–20]

On the same date, Scott Rechtschaffen, an attorney for the Littler firm, and Respondents' witness, wrote to Boltuch as follows:

Burton F. Boltuch, Esq.
Boltuch & Siegel
1330 Broadway, Suite 1326
Oakland, CA 94612

David Powell, President
Teamsters Local 665
6540 Mission Street
Daly City, CA 94014

Re: Royal Motors

Dear Mr. Boltuch and Mr. Powell:

I am writing you at the request of Royal Motors. The purpose of this letter is to inform you that Royal Motors has received objective evidence that a majority of the employees in the collective bargaining unit represented by Teamsters Local 665 no longer wish to be represented by this Union. Based on this objective evidence, Royal Motors doubts in good faith that the Union continues to represent the unit employees. Accordingly, by this letter, I have been authorized by Royal Motors to withdraw recognition of Teamsters Local 665 as the representative of any of the employees of the dealership. The Company will, of course, continue to honor the existing Collective Bargaining Agreement until its expiration date. However, the Company will not be bargaining further with the Union for a new contract.

Very truly yours,
Scott D. Rechtschaffen
[R. Exh. C–22]

Boltuch immediately replied to Rechtschaffen's letter as follows:

Scott D. Rechtschaffen
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, CA 94108

Re: Royal Motors

Dear Mr. Rechtschaffen:

I am in receipt of a hand delivered letter from your office dated April 28, 1989 regarding Royal Motors informing me that Royal Motors has "received objective evidence that a majority of the employees in the collective bargaining agreement represented by Teamsters Local 665 no longer wish to be represented by this Union." Your letter is vague and ambiguous as to the type of objective evidence received and is totally unclear as to the collective bargaining unit for which Royal Motors has allegedly received the objective evidence. As you are hopefully aware, Royal Motors is party to two separate collective bargaining agreements with Teamsters Local 665.

Since your letter is vague and ambiguous and since Local 665 doubts that Royal Motors has received untainted objective evidence with respect to either collective bargaining unit, Local 665 is prepared and will be ready and willing to bargain in good faith at the negotiation session scheduled for May 5, 1989 at 4:00 p.m. with Robert Hulteng concerning Royal Motors.

Very truly yours,
/s/ Burton F. Boltuch
Burton F. Boltuch
[R. Exh. C–24]

On May 4, a day before the first meeting of the negotiators, Rechtschaffen answered Boltuch:

Burton F. Boltuch, Esq.
Boltuch & Siegel
1330 Broadway, Suite 1326
Oakland, CA 94612

Re: Royal Motors

Dear Mr. Boltuch:

I have received your letter dated May 1, 1989, in which you stated that my letter to you, of April 28, 1989, is "vague and ambiguous." In my letter I informed you that Royal Motors had received objective evidence "that a majority of the employees in the collective bargaining unit represented by Teamsters Local 665 no longer wished to be represented by this Union."

I do not know what you mean by vague and ambiguous. While it is true, as you note, that there are two separate collective bargaining agreements—one for parts employees and one for service employees—Royal Motors has only one unit which was represented by Teamsters Local 665. As you are well aware, the Employer bargained with your Union for the Parts and Service employees collectively, the Parts and Service employees have been treated as one unit and the fact that there have been two separate collective bargaining agreements—at a few dealerships but certainly not at all—in no way evidence that there are two separate bargaining units.

As I informed you, the Company will not be entering into negotiations for a new contract with your Union for any of the employees formerly represented by your Union based on the objective evidence which the employer has received.

Very truly yours,
/s/ Scott Rechtschaffen
Scott D. Rechtschaffen
R. Exh. C-26]

a. May 5

When the parties gathered for the first bargaining session, Hulteng presented initial proposals for Royal/Machinists (R. Exh. P-56), Royal/Painters (R. Exh. P-74), German/-Machinists (R. Exh. P-1), German/Painters (R. Exh. P-24), and Honda/Machinists (R. Exh. P-32). No Teamsters proposals were presented because in the case of German and Honda, they had not

yet been prepared, and in the case of Royal, the employer was refusing to recognize the Union. No union proposals were presented because they were not yet prepared. Hulteng stated he hoped to have Teamsters proposals from German and Honda within a week.

As to Royal/Machinists, Boltuch stated, with application to German and Honda as well, that the Machinists considered flat rate to be the principal issue and would be willing to bargain over it, if the Respondents removed all the other "crap" off the table.

As to Honda/Machinists, there was brief discussion of a cafeteria plan proposed by Honda, but then Hulteng orally deleted this proposal. Here again, Boltuch admonished Hulteng that the Unions desired to get down to the "nutcutting," and bargain with respect to flat rate so long as Respondents take all the other "garbage" off the table.

Among the proposals advanced by Respondents and characterized by Boltuch as "garbage" or "crap" were lengthening the probationary time for new employees from 60 to 120 days, permitting the employer to have some input in the selection of the Machinists' shop steward, limitations of $10,000 on stolen tools or tools destroyed by fire, discharge for lack of efficiency or for excessive comebacks, with uncertainty over when the discharge could be grieved, abolishing apprentices, and changes in health and welfare plan and pension plan as previously described.

Before adjourning, Boltuch requested a copy of the British Motors implemented agreement which Respondents had indicated was to be a major source for the proposals in the present case. Hulteng subsequently provided the document, and in the same letter transmitting the British Motors document, Hulteng restated what he had first mentioned on May 5 at the bargaining session: a request to the Unions to have "any and all" information requests submitted to Respondents at the earliest opportunity, but hopefully, Hulteng added, not later than the next bargaining session scheduled for May 15 (R. Exh. C-27).

Hulteng testified that he intended to press the Unions for their information requests, because in Hulteng's prior bargaining experience with the same Unions, union representatives had deliberately delayed making information requests so as to preclude the parties from arriving at impasse. On May 19, Boltuch wrote to Hulteng a letter expressing annoyance at any suggestion the Unions' would deliberately delay submitting information requests (R. Exh. C-30).

The time spent at this first session was approximately 2 hours of which approximately 60 minutes was spent in caucus.

On May 11, Hulteng submitted from German and Honda, the first contract proposals to the Teamsters (R. Exhs. C-28, C-29, P-10, P-17, P-42, P-49). As previously noted, no Teamsters proposals were submitted from Royal at this time.

After Boltuch examined Royal's first proposal, he prepared a document titled "Takeaways" in which he critically reviewed Royal's proposal section by section (GC Exh. 30). For example, Boltuch noted that Royal was seeking to double the probationary period to 120 days and to forfeit employee seniority after layoffs of 60 days or longer, to prohibit the union business representative form visiting the shop to hold discussions with employees, to have the option to discharge employees for lack of efficiency, to include a most-favored-nations[13] clause, to change the Unions' pension and health and welfare plans to employer's plans, and of course, to pay employees under the flat-rate system.

b. May 18 (Royal/Machinists)[14]

On this date, the parties met at the Federal Mediation & Conciliation Service (FMCS) offices in San Francisco, although no mediator was then involved. Boltuch represented the Machinists and Rechtschaffen represented Royal for most of the day. The second portion of the session was devoted to Royal/Teamsters.

The meeting began by Rechtschaffen requesting coordinated bargaining, but Boltuch refusing unless the parties could sit at separate tables. Then the parties exchanged proposals: Royal provided a second proposal (GC Exh. 42) and the Machinists provided its first proposal (GC Exh. 31). Under the latter, Boltuch's proposal included increases in hourly wages, in pension contributions, in vacation (after 15 years of employment) and to delete all bonus and incentive programs from the contract. Royal's second proposal made minor changes to the first.

Among the subjects discussed was the MFN clause which Boltuch objected to as a restriction on the Machinists ability to engage in meaningful bargaining with other dealers.

Then the parties turned to Royal's proposed health and welfare plan and the flexible benefits plan. Boltuch requested information on the plan itself and its costs. Rechtschaffen tendered brochures on the plan and recommended that Boltuch attend the June 1 meeting with Lipman for additional information.

One of the health insurance plans being offered by Royal was sponsored by the Northern California Motor Car Dealers Assn. (NCMCDA). Its administrator, Snow, who never testified, allegedly confirmed to Boltuch sometime before June 1, that this plan had financial difficulties and intended to reduce benefits.

This meeting ended about 6 p.m. Due to scheduling conflicts it was to be almost 3 weeks before the parties met again.[15]

c. June 7 (Royal/Machinists)

This meeting began in the morning hours with Hulteng tendering Royal's "fourth" proposal (R. Exh. P-59) which was really its third. The parties were meeting at Boltuch's law offices in Oakland.

Hulteng represented that Royal's proposal contained both new items and other items which the Machinists had allegedly agreed to in other negotiations with other dealers. Among the changes contained in Royal's fourth proposal was reinstatement of apprentice coverage, the old union-security provisions except that new employees would be required to join the union after 90 days; change in probation period to be 90 days and subject to further extension by agreement; employees to be paid for mandatory service meetings; new language offered regard-

[13] A "Most Favored Nations" clause means that if the Machinists negotiates a provision in a contract with a different dealer which is more beneficial to that dealer than what Royal has, Royal wants the same provision.

[14] The next bargaining session was set for May 15, involving Honda/Machinists. However, I will vary the chronological order to present the evidence involving each separate Respondent, beginning with Royal.

[15] As will be noted below, Boltuch made certain proposals or counterproposals during the German/Machinists negotiations which he applied to Royal as well.

ing grievances; small increase in the wage offer and deletion of MFN clause.

To all of this, Boltuch made an information request regarding tool insurance. Then Boltuch requested as he had before, to remove other "takeaways" off the table, so the parties could focus on flat rate. As an inducement to remove other issues from the table, Boltuch offered to participate in coordinated bargaining. Boltuch then made a counteroffer to impose union-security on new employees within 30 days, continue union health and welfare and union pension plans and apprentice training funds with certain dollar caps. Boltuch added that the term of a new contract should be three years and probation and seniority issues could be negotiated later.

After caucus, Hulteng rejected Boltuch's counteroffer. A Machinists official named Martin who did not testify then made some disparaging comments regarding flat rate. Another Machinists official named Cook who did not testify asked Hulteng if Royal had "costed out" its proposals, but apparently Royal had not formally done so.

The parties discussed flat rate at length with Royal Supervisor Chavez touting its inherent efficiency and explaining in detail how it would work. Boltuch asked how employees were to be disciplined for poor efficiency. This issue was not fully resolved, but for those employees working at over 115 percent of efficiency, Royal proposed that they be paid a bonus.

To many of the questions raised by Boltuch and union officials over flat rate, Hulteng expressed annoyance, saying they knew for 5 years that flat rate was coming. To this Boltuch responded, "F**K YOU!" Martin said flat rate was a method for the dealers to screw consumers by lying to them and by cheating them. Accusations of union-busting were made. When all was said and done, it was clear that union representatives had made statements indicating unyielding opposition to flat rate.

During this session, Drysdale, was present as a law clerk whose sole function was to take notes of what participants said. At one point after Hulteng said the union benefit plans were too expensive but that he didn't know the costs of Royal's proposed plans, Boltuch made the following statement while looking directly at Drysdale, the only African-American present:

> The employees are tired of being treated like slaves, like second-class citizens, like niggers . . . employees were not going to be treated like scum and second-class citizens. . . .
> [Tr. p. 977.][16]

d. June 21 (Royal/Machinists)

On this date about 1:30 p.m., the parties met at the FMCS, but did not engage in bargaining. Instead each side met with Commissioner Jacobsen in an attempt to resolve issues.[17] Jacobsen, who did not testify, tendered to Boltuch a fifth Royal proposal (R. Exh. P-60). Appended to this proposal, according to Boltuch was a two- to three-page handwritten addendum prepared by Hulteng about 3:30 p.m., which said in part, "The Employers do not foresee any further changes in position in their proposals to Machinists Lodge 1305. However, the Employers are willing to meet upon request, at any time over the next seven days night or day, weekday or weekend." (GC Exh. 34.) One of the changes proposed by Royal related to section 10, which made any disputes, complaints or disagreements relating to the employment relationship between employees, the Union and the Employer subject to the grievance procedure.

e. June 27 (Royal/Machinists)

Prior to this bargaining session beginning, Hulteng prepared Royal's final proposal dated June 22 (R. Exh. P-61) which incorporated the handwritten terms referred to above. It was conveyed to the Machinists prior to the June 27 meeting.

This meeting, held at the FMCS, began about 10 a.m. and lasted for approximately 7 hours. Instead of Boltuch, Allen represented the Machinists, along with Nick Shmatovich, a Machinists business representative who testified for the General Counsel. Hulteng represented Royal for a while, then left and was replaced by Franklin. Hulteng began by asserting that Royal had complied with all information requests then pending, a statement which Allen did not challenge. Hulteng also announced that Royal was at final position, but requested Allen to make further proposals, if she had any. None were made but Allen discussed a number of topics with Hulteng and later with Franklin, after Hulteng left.

Royal provided information on its contributions to the preexisting 401K plan in place for nonunit employees. Hulteng reiterated that Royal was not bound to make any deposits to employees 401K plan, as any such deposit depended on Royal's earnings.

Other subjects discussed included a new employee probation period, Royal's option to assign employees to Saturday work for straight time, compulsory attendance at employee meetings, and Royal's proposed 90-day cap for any backpay awarded by an arbitrator. As to flat rate, Allen questioned how to make the dispatch procedure fair and equitable. Hulteng rejected any suggestion that the process was subject to grievance.

As to the health and welfare plan, Royal was proposing Kaiser HMO as an alternative to the union plan, with employees paying for their own dependent coverage. Royal had rejected an 8-hour guarantee for the Machinists. Royal also proposed to tighten safety procedures with potential discipline for employees who failed to comply with safety standards and compulsory attendance at safety meetings. The parties did agree on a method of compensating mechanics for their attendance at these meetings.

On June 28, Royal prepared a second final proposal (R. Exh. P-62) which incorporated the limited agreements reached the day before such as on the selection of an arbitrator (if no agreement, selected from a list from the American Arbitration Assn.) and with respect to increasing the cap on tool insurance from $15,000 limit to $25,000 limit.

f. June 30 (Royal/Machinists)

At this meeting at the Littler office, Franklin and Lawrence Peikes represented Royal and Boltuch represented the Machinists. Peikes, now an attorney with a law firm in Connecticut, testified as a Respondent witness. The meeting started about 2 p.m. and ended shortly after 7 p.m.

[16] To be charitable to Boltuch, I have recited the version supplied by Boltuch himself which is bad enough. According to Hulteng, Boltuch said, "We ain't fucking niggers"! After repeating that several times, Boltuch went to Drysdale and said, "Write that down!" Drysdale remained speechless in the face of this inexcusable affront. The meeting adjourned about 1:30 p.m.

[17] Boltuch had first contacted Jacobsen by letter on June 12 with reference to negotiations with all three dealers (R. Exh. C-38). Hulteng subsequently wrote that while he was willing to meet with Jacobsen, he was reluctant to trade a potential bargaining opportunity for the meeting (R. Exh. C-43).

Again, much of the meeting was devoted to discussing flat rate. Franklin stated that on June 7, Mike Day, the highest Machinists official to participate in negotiations had said that the Machinists would never accept flat rate. Boltuch denied that Day ever made such a statement and I note that Day never testified in this case. Boltuch said at the meeting he was willing to bargain over flat rate, but that he was concerned over the fairness of the dispatching of jobs. More specifically, after a caucus, Boltuch stated he would sign a contract with flat rate if the following issues could be resolved: comebacks, [initial] time allotments; compensation levels, possible hourly [wage] options, and nondiscriminatory dispatch (Tr. p. 1015). (None of these issues was resolved then or at any other time.) Franklin replied that lack of efficiency was not grievable.

Before adjourning, Franklin told Boltuch that the new administrator for Royal's flexible benefit plan was Gene Adams, who was to replace the departed Lipman. Franklin offered to meet for further negotiations on July 1 and 2, but Boltuch said he had arranged to spend time with his family on those days. Accordingly, the parties agreed to meet on July 3.

g. July 3 (Royal/Machinists)

This session was held at the Littler office and began about 10 a.m. and ended about 6:30 p. m. Hulteng represented Royal in the morning, Peikes in the afternoon and Franklin in the evening. When not acting as chief spokesperson, the three attorneys frequently were otherwise present. Boltuch represented the Machinists throughout the meeting. By all accounts, this meeting was bitter, strident, and nonproductive.

All agree that Royal produced its third final proposal (R. Exh. P-63).[18] However, there is much controversy over a handwritten proposal allegedly produced by Boltuch on this day via Jacobsen as each side was in separate caucus rooms. According to Boltuch, he wrote out this two-page document captioned, "Union Partial Offer On Flat Rate" (GC Exh. 35) and gave it to Jacobsen. The "offer" talks of the Employer's subscribing to the principle of fair and impartial dispatching. To resolve disputes of flat rate time allocations, Boltuch proposed a committee to be composed of two representatives designated by the Union and one representative designated by the Employer, or, if the above was not acceptable, some other final and binding mechanism.

Both Hulteng and Peikes testified that they never saw this document before trial preparation began, and certainly, they testified, it was never tendered to them by Jacobsen. I find sufficient evidence from the bargaining notes to show that Royal's representatives received (GC Exh. 35). For example, Boltuch's notes reflect his statement to Peikes with reference to a "flat rate" proposal given to Royal through Jacobsen (Tr. p. 1049). Drysdale's notes (CP Exh. 8) also recite a reference to Boltuch saying across the table, that he had given Royal a proposal through Jacobsen (Tr. p. A3031-32). The Drysdale notes and the reference noted above were shown to and acknowledged by Peikes on cross-examination.

The July 3 session was also marked by one or more caucuses followed by meetings between the parties. On more than one occasion Hulteng said Royal was at final position and did not foresee further movement. After a time, Boltuch said to Jacobsen, "I can't take his [Hulteng's] fucking arrogance. Get him out of here." This led to the parties seeking separate rooms to cool off and to plan additional strategy. At another time in the day, Boltuch said to Hulteng repeatedly, "Fuck You! Fuck You!"

On July 5, Hulteng wrote to Boltuch a letter which reads as follows:

> Burton F. Boltuch, Esq.
> Boltuch & Siegel
> 1330 Broadway, Suite 1326
> Oakland, CA 94612
>
> Re: Negotiations Between Machinists Lodge 1305 and Royal Motors
>
> Dear Mr. Boltuch:
>
> I am writing to provide you with official notice that Royal Motors has today implemented new terms and conditions of employment for employees represented by Machinists Lodge 1305. The implementation of new terms and conditions of employment is pursuant to the notification you previously received from me, and follows the economic action taken by Royal Motors on July 3, 1989.
>
> As of the beginning of the workday today, all terms of the Employer's final offer to Machinists Lodge 1305 were implemented, with the following exceptions: Section 2 (Union Security), Section 10 (Grievance Procedure), Sections 10.1 and 10.2 (Productivity and Quality), provisions of Section 13 dealing with dispatchers, provisions of Section 14 dealing with the flexible benefit plan, and Section 24 (Contract Expiration).
>
> As we stated at the conclusion of our meeting on July 3, the Employer sees no purpose in further meetings at this time. If the Union believes at some point in the future that a meeting would be productive, please contact Commissioner Jacobsen of the FMCS.
>
> Very truly yours,
> I/s/ Robert G. Hulteng
> Robert G. Hulteng

[R. Exh. C-69]

On July 6, Boltuch wrote back to Hulteng asking for a copy of the final offer which was implemented. As to those sections of the final offer which were not implemented, Boltuch asked for an explanation. Finally, Boltuch asked that additional negotiations for Royal/Machinists be scheduled (R. Exh. C-77).

On July 14, Mike Cook, a Machinists business representative wrote a form letter to all Royal Machinists unit employees criticizing the implemented offer including flat rate and other terms and conditions. Cook's letter concluded with a prediction of "an economic disaster with this Employer," unless the union is able to turn matters around (R. Exh. 10).

h. May 18 (Royal/Teamsters)

After spending time discussing issues relating to Royal/Machinists, the parties turned their attention to Royal/Teamsters. With respect to Royal's refusal to recognize and bargain with the Teamsters, Rechtschaffen claimed rather than two separate units with separate bargaining agreements, which had been the case in the past (see 1986–1989 Royal/Teamsters Service, parts agreements, GC Exhs. 27, 28), there now existed one overall unit. To Boltuch's request for evidence in support of this unit, Rechtschaffen promised said

[18] This final proposal made no changes in basic concepts, but did make some minor changes.

evidence "in due time" (Tr. p. 807). As matters turned out, Boltuch would not have to wait long.

Close to 5 p.m. on May 18, Hulteng entered the bargaining and replaced Rechtschaffen as spokesman. Hulteng then stated Royal would be willing to bargain for Royal/-Teamsters (service) but not for (parts).[19] Hulteng tendered a proposal labeled Employer's Second Proposal (R. Exh. P-65). Boltuch protested that he had never received Royal/-Teamsters first proposal, so Hulteng requested Boltuch to change the proposal to Royal's First. In response to Boltuch's question as to how the proposals differed from Teamsters proposals tendered by German and Honda, Hulteng responded, wages, retirement (profit/sharing), health and welfare, jury duty, and physical examinations.

After only about an hour of discussion, Boltuch offered to continue the meeting but Hulteng noted that he had been told the FMCS building closed at 6 p.m. and the parties would have to cease meeting and leave the building. Before adjourning for the evening, the parties agreed on May 31 for the next Royal/Teamsters meeting.

i. May 31 (Royal/Teamsters)

The parties convened at the Teamsters' office about 9:30 a.m. and Boltuch began by requesting Royal to bargain with the parts unit but Franklin, on behalf of Royal, refused. Instead, Franklin presented a second proposal with minor changes in the preamble and certain other changes taken from proposals made to the Teamsters by German and Honda (R. Exh. P-65A).

After a 30-minute union caucus, Boltuch made an oral counteroffer to Royal on behalf of Teamsters Service unit only. The counteroffer was in the form of an Option A and Option B. As to Option A, Boltuch agreed to the preamble, asked to reinstate language requiring employees to join the Union and delete the open shop language, proposed returning the probationary time for new employees back to 60 days, and made numerous other proposals, which yielded little if any agreement on wages, health and welfare, and the like. As to Option B, Boltuch proposed that the parties basically ignore other issues and concentrate on wages and retirement. Like Option A, this proposal was not well received, as Royal said all issues were important to them.

On June 1, Boltuch met with Lipman in a meeting referred to above in footnote 8. By all accounts this meeting was tumultuous and, according to Boltuch, resolved nothing, primarily because Boltuch had not received certain documents he had previously requested describing the health plan offered by Royal and other employers. As noted above, shortly after the meeting, Lipman resigned.

j. June 16 (Royal/Teamsters)

On this date Boltuch's then law partner, Jonathan Siegel represented the Teamsters in Boltuch's absence. Hulteng represented Royal. Shortly after bargaining began, Royal took a long caucus. Upon returning, Hulteng stated that Royal was prepared to recognize the Teamsters parts unit and commence bargaining with it. Hulteng testified that Royal took this step "in response to statements and concerns raised by Siegel, and in response to his contention that Royal had unlawfully refused to bargain with Local 665 with respect to the parts unit" and in response to Siegel's [unchallenged] representations "that he had evidence that would show [that Royal's refusal to bargain] was an unlawful action." (Tr. p. 3334–3335). On cross-examination, Hulteng testified that Royal withheld recognition and bargaining from the Teamsters parts unit due to a petition that Royal had received from employees (Tr. p. 3746).

In refusing to credit Hulteng's testimony here or that provided above in explanation for the belated recognition of the Teamsters service unit, I note the following:

(1) Hulteng's initial testimony of merely responding to Siegel's claim of illegal activity is belied by the Teamsters/-parts proposal which had apparently been prepared ahead of time (R. Exh. P-70).

(2) Hulteng's linking of the failure to bargain with Teamster's parts to an employee petition is not specifically reflected in any document or prior statement of Royal.

(3) Hulteng was not in the business of following the orders of opposing counsel.

In any event at this meeting, Royal presented its first parts proposal (R. Exh. P-70) and its fourth service proposal (R. Exh. P-67). Little actual bargaining occurred because, without explanation, Hulteng stated he had to cut off bargaining for a time, although he offered to resume bargaining later the same afternoon or the following day. Siegel said he'd be in touch.

On June 21, the parties met at the FMCS, and Royal tendered a second parts proposal (R. Exh. P-71). However, no formal bargaining occurred as the parties met with a Federal mediator.

k. June 27 (Royal/Teamsters)

The parties met at Engineers and Scientists Hall with Littler attorney and Respondent witness Joe Ryan as lead negotiator for Royal and Boltuch representing the Teamsters. Ryan presented the Union with a third parts proposal (R. Exh. P-72). Among the subjects discussed is where current parts employees were to be slotted in Royal's proposed commission plan which was to be based on a percentage of Royal's gross profit. Ryan didn't know the answer. Nor did Ryan know if any of Royal's journeymen would take a pay cut under Royal's proposed commission plan. As to Royal's proposed profit-sharing, Ryan explained that Royal was not committing itself to any particular amount as its contribution. Ryan also explained to the Federal mediator, Carpenter, that Royal wanted out of the Teamsters retirement plan as it was too costly. Instead Royal wished to propose a 401K plan where again Royal was not obligated to make any particular contribution. As to Royal's proposed health plan, Boltuch objected to its description as a "non-union" plan.[20]

Before adjourning, the parties executed an extension of the Royal parts and service collective-bargaining agreements through June 12 with an least one additional bargaining session scheduled for July 10 (GC Exh. 29).

l. July 10 (Royal/Teamsters)

At this meeting in the Littler offices, Allen represented the Teamsters in Boltuch's absence. Rechtschaffen and Ryan represented Royal and presented the Teamsters with a fifth service proposal (R. Exh. P-68). Between the hours of 9 a.m. and 2 p.m., the parties bargained with little progress.

[19] In his testimony, Hulteng explained Royal's position: "it was May 18 where we had agreed to bargain on behalf of the service unit. We did that because the Union contended there were two separate units. And we said to the Union, rather than argue the point, we'll just accept your contention and bargain in the service unit." (Tr. pp. 3636–3637).

[20] Royal representatives explained that this nomenclature meant that the plan had formerly been offered to Royal's nonbargaining unit employees.

Much of the discussion dealt with wages. Under the prior agreements, both parts and service employees had been paid a straight hourly wage. Again the question of slotting came up as employees were subject to transfer from an hourly wage to a multilevel commission system under Royal's proposal. Rechtschaffen replied to Allen that the slotting of particular employees was within the employer's discretion. However, according to Royal executive Hansen, the Company would be guided by the employees' skill, experience, knowledge and productivity. Once the slotting decision was made it would not be subject to grievance and arbitration.

Under plan A or plan B proposed by Royal, employees might remain as hourly employees or might be transferred to the commission plan, again within the discretion of Royal. Royal also proposed deleting the guaranteed work day and work week.

By agreement, the bargaining session concluded at noon. Allen proposed that the contract be extended a second time through the end of July. Allen added however that she was not available for further bargaining until July 24. Royal representatives refused to extend the contract, stating it would expire on July 12.

m. July 24 (Royal/Teamsters)

At this final meeting between the parties, Boltuch represented the Teamsters and Franklin represented Royal for most of the day. Hulteng arrived in late afternoon. The meeting began about 9:30 a.m. and lasted into the early evening. Franklin presented, two final proposals to Boltuch, one for service (R. Exh. P-69) and one for parts (R. Exh. P-73). During the bargaining, Royal proposed a new wage offer for service employees to be followed by a wage freeze for the next 5 years, and with the Union allowing Royal to pay over scale at its discretion.

At one point, Boltuch offered to agree to Royal's incentive pay plan for parts if Royal agreed to the Teamsters' position on benefits. Boltuch also agreed to accept a 90-day probationary period, if other issues could be resolved. Additional discussions involved specific wage levels. After a late afternoon caucus, Hulteng returned and accepted the Teamsters proposal that all employees compensated under plan B incentives shall be entitled to overtime compensation, under section 5 of the agreement. Then Hulteng made a counterproposal to calculate overtime on base wages only. Boltuch promised to consider that. Royal accepted the Teamsters' definition of gross profit.

Finally, the parties discussed a meeting coming up with Royal's pension expert Gene Adams which Boltuch or his representative expected to attend.

The bargaining session ended shortly after 5 p.m. Before leaving, Boltuch offered to cancel his vacation in order to continue bargaining with Royal. However, Hulteng noted that Royal was at final position in its proposals and no further meetings were scheduled.

The following day, July 25, Hulteng wrote two letters to Boltuch: the first letter stated that Royal was "at final position on all issues." However, Hulteng suggested seven possible dates for additional bargaining (R. Exh. C-139). Hours later, Hulteng sent a second letter enclosing Royal's final offer, revised to incorporate changes made at the bargaining table on July 24. Hulteng added that Royal did not foresee any additional movement from this final proposal (R. Exh. C-140).

On July 31, Royal locked out its Parts and Service Department employees, and on August 1, Hulteng sent a letter to Boltuch which reads as follows:

> Burton F. Boltuch, Esq.
> Boltuch & Siegel
> 1330 Broadway, Suite 1326
> Oakland, CA 94612
>
> Re: Negotiations Between Royal Motor Sales and Teamsters Local 665
>
> Dear Mr. Boltuch:
>
> I am writing to advise you that, effective with the commencement of business today (August 1, 1989), Royal Motors has implemented substantial portions of its final offer to Teamsters Local 665. Royal Motors has implemented all sections of the final offer, with the exception of Section 3 of the Service proposal (Union Security), Section 18 of the Parts and Service proposals (Grievance and Arbitration), and Section 28 of the Parts proposal and Section 30 of the Service proposal (Contract Term).
>
> Royal Motors has implemented its final offer following economic action taken on July 31, 1989, and given the continued impasse in negotiations between the parties.
>
> Very truly yours,
> /s/ Robert Hulteng
> Robert G. Hulteng

[R. Exh. C-151a][21]

n. Conclusion of Royal negotiations

At volume 1, page 3, footnote 2 of the General Counsel's brief, the writer notes,

> Because there is no complaint allegation concerning the Respondent-Painters negotiations, there will be no discussion in the brief concerning those negotiations.

This appears to be a wise choice and I adopt it for this decision. I should note, however, that there were negotiations which were unsuccessful in reaching agreement with the Painters. On July 5, Hulteng sent notice to the Painters' then attorney Rosenfeld of implementation of Royal's final offer to the Painters except for union security, grievance procedure, adjustment board and arbitration, expiration and revision, and the flexible benefit plan (see R. Exh. C-59A, another unmarked letter which I have marked next in order).

On July 12, Hulteng sent a letter to Boltuch stating that due to objective evidence received by Royal indicating that the Machinists no longer represent a majority of Royal bargaining unit employees, the Employer was withdrawing recognition and would not be engaging in further negotiations with the Machinists (R. Exh. C-78).

None of the Unions' involved in this case ever struck Royal as a result of these negotiations.

3. Bargaining sessions (German)

As noted above, German distributed its first proposal at the May 5 meeting. Like the proposal for Royal, it made drastic changes from the 1986–1989 collective-bargaining agreement (compare first German proposal, R. Exh. P-1 to 1986–1989 agreement, GC Exh. 33). It suffices to say that in most or all

[21] Due to error, this letter was not marked with an appropriate exhibit number. I have taken the liberty of marking it next in order.

material respects, German sought the same changes as Royal, including flat rate for its mechanics as well as an alternative hourly wage schedule at German's discretion and including substituting new health and welfare and pension plans for the Union's plans. It also sought to add the same new sections as did Royal, including potential discipline for lack of efficiency, a management-rights clause, and MFN clause. As to shop stewards, German proposed that it have some input in selection of the Union's shop steward and that the Union's business representative be required to give notice before visiting the work place.

Subsequent to the meeting of May 5, Boltuch prepared a document entitled "German Motors Takeaways, As Proposed By the Employer on May 5, 1989" (GC Exh. 5). In this four page document which was circulated to bargaining unit employees prior to the May 16 bargaining session, Boltuch critically analyzed German's initial proposal.

a. May 16 (German/Machinists)

This meeting occurred at the Littler offices, and began about 12:30 p.m. Less than 2 hours later, the meeting came to a premature halt when Boltuch received an emergency phone call from his wife reporting that a member of Boltuch's family had become seriously ill. Beside Boltuch for the Machinists, Hulteng represented German and had representatives of Royal and Honda present. Before he was required to leave, Boltuch said he would bargain with German on a nonprecedent basis on behalf of all unions. However, very little bargaining actually occurred as the parties took a long caucus without knowing the meeting would be much shorter than planned.

Hulteng did provide a second proposal just prior to the caucus (R. Exh. P-2). Boltuch testified that he too presented a written proposal, but the proposal is not in the record. Before adjourning, the parties agreed on May 25 as the next bargaining session, but Hulteng was available for only half the day, not the full day requested by Boltuch.

On May 24, Boltuch attended a meeting at the Littler law firm where the unscheduled subject of the German/-Machinists came up for discussion. Boltuch was told by German representatives that German was not proposing a cafeteria plan.

b. May 25 (German/Machinists)

On this date, the parties returned to the Littler offices. Boltuch and J.B. Martin represented the Machinists and Hulteng and Rechtschaffen represented German. Boltuch made two separate counteroffers at this meeting which he characterized as option 1 and option 2.

As to option 1, Boltuch first went over each section of German's May 16 proposal (R. Exh. P-2). Among the counteroffers, Boltuch agreed to a portion of Section 7 on tool insurance, but not to the proposed $500 deductible nor to the $10,000 cap on claims. In addition, Boltuch agreed that German could schedule compulsory service instruction meetings, but then asked if employees were to be paid for their time. Hulteng replied that it was within the employer's discretion. As to new rules, Boltuch proposed language from the old contract, i.e., German had to give notice and bargain with the Union. As to shop stewards, Boltuch rejected any right to employer input in selection, but agreed to one steward per unit.

Boltuch went on to delete the Machinists request for two additional holidays but then proposed to add a different one, King's birthday. Boltuch then proposed modifications of its wage proposal: for increases of 1.50, 1.50, and 1.40 over 3 years.

The Machinists through Boltuch also made proposals on employee moonlighting, employee incentive (bonus) plan, retiree health and welfare (continue current contribution of $18/month with cap of $21/month), nondiscrimination language in contract, and a 3-year term of the contract.

As to health insurance, Boltuch proposed that employees be covered either under Kaiser HMO or Automotive Industries plan (a Taft-Hartley plan). As to the pension plan, Boltuch proposed that German continue its Taft-Hartley plan from the old contract, but bargain with the Machinists to lower its contributions.

Option 2 was made to all three dealers on a nonprecedent basis. As part of this proposal, Boltuch testified he was willing to bargain with all three dealers on a coordinated basis over flat rate. The bargaining was to be based on the British Motors concept of flat rate, after all the "garbage and takeaways" were removed from the table. As part of his option 2 proposal, Boltuch requested that German continue its contributions to the Automotive Industries fund (for health insurance) and to the Taft-Hartley pension trust fund established under the old contract.

After taking a caucus, Hulteng rejected or made counterproposals to all of Boltuch's counterproposals in option 1. Hulteng also rejected Option 2 on behalf of all three dealers. After this rejection, Boltuch withdrew his package offers and his conditional offers to bargain with the dealers on a coordinated basis. When Hulteng attempted to present counterproposals on behalf of Royal and Honda as well as German, Boltuch stated he would only accept counterproposals on behalf of German and if Hulteng persisted in presenting counterproposals on behalf of the other two dealers, Boltuch would walk out. Ultimately Boltuch did just that without agreeing to a subsequent date for German/Machinists (R. Exh. C-33, p. 2).

On May 31, Boltuch met with Franklin at the Littler firm regarding other negotiations. During the course of that meeting, Franklin confirmed that neither German nor Honda was proposing a flexible benefit plan, only Royal. After the meeting concluded, Boltuch talked to Franklin regarding additional negotiating dates for German/Machinists. Ultimately, June 14 was agreed upon. Then before Boltuch left, Franklin gave him four envelopes with Kaiser brochures inside. Although the material in each envelope apparently was identical, Franklin was unable to explain exactly from which employers the envelopes came and to which Unions they were directed. Franklin took the envelopes back and promised to find out.

c. June 14 (German/Machinists)

The parties met about 10:30 a.m. at the Machinists Lodge Hall in Oakland until shortly after 3 p.m. The location was selected for Boltuch's convenience as he had flown into the Oakland Airport just that morning (Tr. p. 2480). Boltuch represented the Machinists and he was assisted by Mike Day, head of Machinists District Lodge 190 and several other business agents. Hulteng headed the German contingent which included Schmitt.

According to Boltuch, he attempted to make oral proposals, but Hulteng rejected this on the grounds that it was coming too late. Hulteng denied making this statement and I credit his de-

nial.[22] Hulteng did provide German's third proposal (R. Exh. P-3) which included a flexible benefit concept that Franklin had previously said German would not be offering, and a 401K plan instead of a pension or profit-sharing plan previously promised.

German's proposal on wages for mechanics contained alternatives, either hourly or flat rate, and for service writers, hourly or commission. When the parties discussed where the mechanics would be slotted in German's proposed 15 different levels, Hulteng answered he didn't have answers to those questions as yet. Shmatovich did make oral proposals on behalf of the Machinists, in effect to return to the status quo, with increases in hourly pay, more and better benefits, and an increase in pension contributions.

As to Mike Day, he played a major role in the negotiations. Boltuch testified he had Day there to rebut a claim by German representatives that Day had said at some past negotiations that the Machinists would never accept flat rate. Rather than rebutting the description of Day's past remarks, Boltuch's testimony about Day's remarks at the June 14 meeting appeared to confirm the impression that the Machinists would never accept flat rate. According to Boltuch, Day said across the table that he was not in favor of flat rate which Day felt was a consumer rip off. Moreover according to Boltuch, Day said the Machinists were saying "no" to other major takeaways proposed by German such as elimination of health and welfare and pension plans.

According to Boltuch, Day further explained his view of flat rate and German's desire for same. In Day's opinion, German was not really interested in flat rate, but was trying to provoke a labor dispute "to bust the union." According to Hulteng, Day also referred to a number of settlements which the Machinists had reached recently with dealers in the neighboring community of Contra Costa County. Day said none of these settlements included flat rate because unit employees were not interested in flat rate. If German took flat rate off the table, Day said, the Machinists would work to find cost savings in German's health insurance. In sum, Day concluded, that the Machinists was opposed to flat rate and was attempting to get state legislation to ban the concept.

Another theme at this meeting was Boltuch's personal attack on Schmitt and his ethnic background. Boltuch said that German's proposals reminded him of 1930s Germany, with Hitler and his Nazis. Still another theme was sounded by Boltuch and Martin who made "wedge" comments about Henry Schmitt and his seriously ill father, Dieter Schmitt. The latter had yielded day-to-day management to Henry Schmitt by the time negotiations had begun. Martin said Henry Schmitt was attempting to dismantle what his father had built up over the years. Someone else said, if Dieter Schmitt were present, he'd be ashamed of what Henry Schmitt was trying to do.

Despite the rhetoric, some bargaining actually occurred. German agreed to reinstate the union-security provision from the old contract and eliminate its proposal for an open shop. German also agreed to pay employees regular pay and overtime, if applicable, for attendance at compulsory meetings. And German withdrew its proposal to have a role in the selection of the Union's shop steward.

As the session ended, the parties had failed to engage in any meaningful bargaining over flat rate, health and welfare or pension plans. I find that if Day ever stated that he was willing to bargain over flat rate, Hulteng could and did reasonably place little value in Day's alleged willingness to bargain.

d. June 21 (German/Machinists)

This meeting occurred at the FMCS with Commissioner Jacobsen in attendance, apparently at the request of Boltuch. Hulteng provided German's fourth proposal with only minor changes (R. Exh. P-4). At first, both sides were kept separated by Jacobsen; later they were brought together. Hulteng provided to Jacobsen, a handwritten document referred to above in the Royal/Machinists discussion, asserting that German was at final position, and would not be moving (GC Exh. 34). The mediator conveyed the document to Boltuch. Boltuch testified that he told Jacobsen that under certain [unspecified] conditions, the Machinists would be willing to bargain with German over flat rate.

On June 22, Hulteng wrote to Boltuch enclosing a "final" proposal dated June 22 (R. Exh. P-5) which according to Hulteng's letter, made several changes in [German's] position, based on concerns expressed by the Machinists through Jacobsen (R. Exh. C-46). In the same letter, Hulteng gave written notice of German's, Royal's and Honda's intent to engage in economic action, as required by the old contract, as prelude to implementation of all Respondents' final offers.

German's final proposal on June 22 made minor changes in the tool insurance deductible from $500 to $250, the rate of pay for Sunday work, and one or two other areas of little consequence.

e. June 28 (German/Machinists)

On this date, the parties returned to the FMSC for a marathon 13-hour session which ended after midnight. At first, Franklin represented German, with Hulteng arriving about 1:30 p.m. after several hours of negotiations had already occurred. Boltuch, Shmatovich, and Cook represented the Machinists. Jacobsen played a major role, meeting with both sides separately and together.

In addition to bargaining over the usual topics, some other subjects were discussed. For example, Boltuch requested in writing that German and Royal not lock out employees on July 3 before implementing final proposals on July 5 (GC Exh. 6). When Hulteng arrived, work rules were discussed. According to Boltuch, some work rules desired by German were illegal and therefore unacceptable. Boltuch also announced that Lipman had resigned as administrator of German's [and Royal's] flexible benefit plan. After Franklin confirmed this information, the parties discussed who would replace Lipman. Boltuch asked several questions regarding the plan, such as what benefits it would offer. During the hearing, Boltuch testified that at this session, Hulteng stated he would not accept oral proposals or oral counterproposals. Hulteng denied making any such statement and I credit his denial. Any such statement by Hulteng would have been immediately reported by Boltuch to the Federal mediator, but there is no evidence of any such report having been made.

About 11 p.m., Hulteng proposed to recess for the evening and to resume the following morning. Boltuch said he was not available the next day. Then Shmatovich made an information

[22] I have reviewed the notes of this meeting (R. Exh. N-21A, pgs. 419–424) and I am unable to find a report of Hulteng's comment. For the same reason, I also don't believe Boltuch's testimony that Hulteng told Boltuch, Mike Day and a host of other Machinists business representatives that as a result of German's proposals, German would probably be going nonunion.

request regarding the number and description of every tool owned by German. Boltuch testified that this information was necessary to assist the Machinists in understanding German's flat-rate proposal and to assist the Union in making a counteroffer. More specifically, the manuals to be used by German assumed for purposes of giving time allotments for specific jobs, that all necessary hand and power tools were available. So the Machinists, according to Boltuch, merely wanted to see if this were so. Employer representatives, however, noted the hour the request was made and the demeanor of Shmatovich and Boltuch while the former made the request—laughing and joking around—to imply the information request was not being made in good faith.

As to another issue regarding information request, Schmitt permitted Machinists representatives, Shmatovich, and others, to go to German and physically remove several file cabinets of past repair and work orders. Again it was said that these documents were necessary for the Machinists to analyze the flat-rate issue. After several days, the file cabinets were returned to German. According to the Machinists, the records were kept in such a way that no conclusions regarding the effect of flat rate on employee income could be drawn. The condition of the file drawers upon return indicated to Schmitt that several drawers had never been looked at; other drawers had been examined and the documents refiled out of order.

Turning now to bargaining, such as it was, I note that regarding flat rate, Boltuch proposed to limit the effect of comebacks on a particular employee's income, so that the individual mechanic was responsible only for those comebacks which were proven to be his fault.

Hulteng explained that German needed discretion to assign employees to Saturday work, if necessary. German also desired discretion to pay employees over scale, if necessary. Boltuch proposed to double the probation period from 30 to 60 days. Boltuch denied that the Machinists had accepted 90 days before. As to loss of seniority due to injury or illness, Hulteng accepted Boltuch's claim that state workman's compensation law precluded loss of seniority for any work-related injury.

After a luncheon recess, Hulteng told Boltuch there were five areas where German was at final position and would not move: flat rate, retirement/profit-sharing, health and welfare, seniority, and hours and overtime. To slot employees at a flat-rate level, Hulteng said that German would rely on its assessment of employee experience, efficiency, ability, and productivity.

As to seniority, Boltuch proposed that after a layoff, an employee had 5 days to return or the person would lose seniority. Hulteng insisted that 3 days should be the limit. German agreed to delete its request for 24 hours notice before a Machinists business representative could come to German's premises. So long as an employee was contacted on nonwork time in a nonwork place, German did not object.

Before finally adjourning for the evening, the parties agreed to meet on June 30. On June 29, Hulteng wrote a letter to Boltuch in which Hulteng reiterated that German was at "a final position on principal issues in these negotiations." Hulteng also stated on behalf of all employers that no unilateral action would be taken prior to July 5, so as to provide the Union was additional time for negotiations (R. Exh. C-56).

f. June 30 (German/Machinists)

This session at the Littler firm, was scheduled to begin at 11 a.m., but didn't get started until after noon. Boltuch and Allen represented the Machinists with Allen taking over when Boltuch left about 1:15 p.m. Hulteng and Franklin represented German.

Early in the meeting, Boltuch announced a drastic change in the Union's position. That is, Boltuch said the Machinists were ready to bargain over flat rate—subject to resolving certain collateral issues such as comebacks, fair dispatching, time allotments, and menu issues (special dealer promotions where customers can choose from a list of maintenance jobs at reduced cost). Allen explained that the best method of resolving these issues was through the grievance and arbitration process. Any discharge or discipline resulting from alleged inefficiency should be grievable, Allen argued. Hulteng objected that time allotments taken from standard manuals used by German for flat rate jobs would not be grievable.[23] However, a claim that one employee received a different time allotment for the same job would be grievable.

As part of the Machinists proposal on flat rate, Allen proposed an hourly rate of $24.50 with a 40-hour guarantee. Part of the Union's proposal was apparently taken from other negotiations between the Machinists and Diablo/Mazda Motors in Contra Costa County, also represented by the Littler firm. The employer there had rejected the Machinists proposal as did German. Allen arrived at the $24.50 rate by computing the value of German takeaways in pension, health and welfare, holidays, vacation time, etc., and adding that figure to the existing hourly rate of $19.23 for mechanics.

German also presented a proposal, its second final proposal (R. Exh. P-6). Franklin said the only flat-rate proposal German was interested in was the one contained in its final proposal. She rejected Allen's proposal to resolve the issues mentioned above through the grievance procedure. As to dispatch procedures, Hulteng said German might use a computer in the future, but for the short run, no changes were contemplated. Franklin also opined that the parties had reached impasse. Hulteng added that German intended to implement its final offer on July 5, but did not expect to place its employees on flat rate immediately. Before he left, Hulteng also asked both Allen and Boltuch to make proposals.

Among other subjects discussed was Allen's alternative to the grievance procedure—a three-person committee with two members appointed by the Union—to resolve disputes regarding flat rate and other issues. She also proposed that contrary to past practice, German provide employees a complete set of power tools at German's expense. In a new contract, Allen proposed that German insert a statement that the employer will subscribe to the principle of "fair and impartial" dispatch.

Hulteng rejected all of Allen's proposals as contrary to what German was trying to achieve. He particularly noted that Allen's flat-rate proposal constituted a wage increase of 25 percent and with a 40-hour guarantee element, was not even a true flat-rate proposal at all. In sum, Hulteng characterized the Union's proposal made on the day the contract was expiring as "regressive bargaining."

[23] Under the German proposal, the Machinists only remedy for a grievance that a time allotment was too short for a given job was to appeal to the factory that publishes the manual to change the publication.

Before adjourning, the parties again discussed work rules and the German health and welfare plan. Franklin answered some questions about this, but referred Boltuch to the administrator of the plan for additional information. Allen attempted to get certain ERISA information from Franklin, but she was not successful. In his testimony, Boltuch noted his desire to meet with the administrators of both the health and welfare and the 401K plan, to have answered some of the questions deferred by Franklin.

Allen proposed that the parties meet again on July 3 and Hulteng agreed.

g. July 3 (German/Machinists)

This session began in the morning with Hulteng as the German representative. After lunch, Hulteng left and was replaced by Peikes. About 6 p.m., Franklin took over for the last 30 to 60 minutes. For the Machinists, Allen was in charge for the entire time. Hulteng presented a third "final" proposal at this session (R. Exh. P-7). This proposal made certain changes including adding language on the union-security clause in response to union concerns, changing the probation period from 120 days to 90 days, changing the language regarding hours and overtime and adding language on the subject of work rules, increasing the level of tool insurance coverage, adding an incentive bonus plan, a flexible benefit plan, and 401K plan, and deleting MFN.

Hulteng stated that German was at final position and would not move from its central concepts. Allen complained that German had failed to provide IRS documents necessary to analyze German's 401K plan. Littler Attorney Seamans provided a lengthy computer printout with information to assist the Machinists in determining how German might enforce its efficiency and productivity goals. Seamans stated he had provided a copy of the printout to Machinists Business Representative Chuck Netherby, a few days before.

On July 5, Hulteng wrote to Boltuch giving notice of partial implementation of German's final offer—all terms to be implemented except for union security, grievance procedure, productivity and quality, dispatcher provisions, flexible benefit plan, and contract expiration. Hulteng concluded his letter by restating what he had said at the conclusion of the July 3 meeting—that German sees no purpose in further meetings at this time, but if in the future, the Union believes further meetings would be productive, it should contact Commissioner Jacobsen (R. Exh. C-70).

On July 6, Boltuch wrote back to Hulteng asking which "final" offer was being partially implemented, and what would be substituted for the subjects not being implemented. Boltuch concluded by stating that the Union desired further meetings to meet and bargain in good faith to resolve the unresolved contract issues (R. Exh. C-74).

h. July 26 (German/Machinists)

This session occurred at the offices of the Engineers and Scientists with Boltuch representing the Machinists and Franklin representing German. German provided another proposal, its fourth final proposal (R. Exh. P-8). In this document German provided for the first time a wage rate proposal for dispatchers. Other major changes were also contained in this proposal. For example, German was offering to pay for dependent medical care as it had in the expired contract. In addition, German had revised its flexible benefit plan proposal to include child care.

According to Franklin, the flexible benefits plan had not been implemented due to concerns raised by the Union over the change in administrators. Contrary to Boltuch's testimony, Franklin denied at hearing that she ever stated that all union offers or counterproposals had to be in writing. I credit her testimony on this point. Boltuch presented no offers at this session, despite Franklin's invitation to do so.

The parties discussed a provision of an agreement allegedly reached between German and the Painters regarding flat rate, which Boltuch wanted for the Machinists. Franklin indicated reluctance to extend this to the Machinists.

During the meeting, Boltuch had been complaining periodically about back pain and finally told Franklin he was unable to continue. When Franklin questioned his sincerity over the matter, Boltuch lost his temper and responded with a spate of profanity directed to Franklin. The parties then adjourned. This was the final German/Machinists meeting.[24]

i. German/Teamsters negotiations

During the period 1986–1989, German had collective-bargaining agreements with the Teamsters representing its service and parts employees (GC Exhs. 9, 10). When the parties first met on May 5, as noted above, Hulteng stated that no employer had proposals to give to the Teamsters.

j. May 16 (German/Teamsters)

This session occurred at the Littler office and lasted less than two hours, due to the medical emergency involving a member of Boltuch's family, as recited above in the German/Machinists section.

Prior to the meeting, German had mailed its first proposals to Boltuch (R. Exhs. P-10, P-17). In response to Boltuch's question asking how German's proposals differed from Honda's, Hulteng identified a number of areas including the health and welfare plan (German was proposing Kaiser HMO only), language relating to jury duty; retirement (German wanted discretion to implement either profit-sharing or a 401K plan), wages, hours, and overtime.

In a document dated May 15, Boltuch wrote as follows:

GERMAN MOTORS CORPORATION

dba

TAKEAWAYS—SERVICE

AS PROPOSED BY THE EMPLOYER ON

MAY 15, 1989

Section 3 – Union Security

Open Shop

Section 4 – Seniority

120 days probation, layoff by Employer's Discretion, shorter time to return to work from layoff. Employee may lose his job if ill for an extended period. Layoff by Employer's business needs as determined by Employer.

Section 5 – Hours and Overtime

No 40 hour guarantee, no premium pay, no 5 day consecutive work week, no (2) consecutive days off, Saturday and Sunday work at straight pay.

[24] On August 1, German issued its fifth "final" proposal with certain minor changes, but no additional negotiations occurred.

Section 6 – Temporary Employees

No premium pay.

Section 7 – Shop Steward

The Employer will have a voice in selection of the Shop Steward.

Section 9 – Vacations

Three (3) weeks after six (6) years, deleted fourth (4) week. Employee must take vacation or lose pay, employee must work at least 120 hours per month.

Section 10 – Holiday

Delete July 4th, Martin Luther Kings Birthday, Employee's Birthday, two (2) floating holidays, the day preceding Christmas and New Years. No holiday pay if the holiday falls on Saturday or Sunday. Work performed on holidays shall be paid straight-time rate.

Section 11 – Health and Welfare

Delete Major Medical, Dental, Orthodontia, Vision, Prescription Drug and Life Insurance ($25,000) and Kaiser option. No Maintenance of Benefits. No six (6) months worker's compensation premiums paid. All Employees must enroll in Employer's plan. Delete Accident and Sickness Disability Plan, 35% of Employees wage rate.

Section 12—Pension

Delete, Union Western Conference Pension at $1.00 per hour and Supplemental Income Plan at $.32 per hour.

Employees must be enrolled in Employer's Kaiser Plan only.

Delete Funeral Leave

Delete 80 hours for Jury Duty

Delete Leaves of Absence, Maternity Leave, Alcohol/Drug Rehabilitation, Personal Leave

Delete 10% for Forepersons

Delete Shift Premiums

Delete one weeks notice of change shift

Section 18 – Grievance

Employer shall not terminate more than 25% of the work force within 30 days.

Cut wage and no wage increases for five (5) years. Expiration date five (5) years.

All laundry shall be paid for by the employee. Overscale pay can be removed at anytime.

GERMAN MOTORS CORPORATION

SERVICE

Cut wages by 21%.

[GC Exh. 11.]

This document was then distributed to all Teamsters/service employees at German. Boltuch prepared a similar document for German/Teamsters parts employees, but it is not contained in the record. Among the changes proposed by German to parts employees was to compensate employees for their work based on a percentage of the unit's profit-earnings, with German retaining discretion as to details of how the incentive plan was to operate.

On behalf of the Teamsters, Boltuch presented two written proposals for the service and parts employees (GC Exhs. 12, 13). After receiving the Teamster proposals, Hulteng took a caucus and upon his return, presented German's second set of proposals (R. Exhs. P-11, P-18). Soon after, Boltuch left due to the medical emergency and the session adjourned.

k. May 22 (German/Teamsters)

This session was held at the Teamsters office with Franklin and Rechtschaffen representing German and Boltuch representing the Union. Due to a shortage of time, the parties accomplished little, having discussed only sections 1 and 2 of the parts proposal.

l. June 6 (German/Teamsters)

This session was held at the Littler offices with Hulteng and Franklin representing German and Boltuch and Allen representing the Teamsters, with the assistance of Teamsters business representative and General Counsel witness Bruce Kuhn. Hulteng presented German's third proposals (R. Exhs. P-12, P-19). According to Boltuch, Hulteng said the new proposals represented movement from prior negotiations and contained new wage offers with a parts incentive plan. Boltuch protested that the parties had never discussed a parts incentive plan prior to this. After an employer caucus, Hulteng returned to offer three additional verbal proposals for parts and service. First, German agreed to the Teamsters proposal on union security requiring a new employee to join the Union after 30 days; or be subject to discharge. Second, German deleted MFN, a step which Boltuch agreed was major movement. Third, as to grievance and arbitration, German was proposing to cap any backpay award at 90 days. To this, Boltuch did not respond favorably.

The parties then discussed outstanding information requests relating to the health and welfare plan. Boltuch had requested all surrounding information relating to the Kaiser HMO. As already noted, on June 1, Franklin had attempted to give Boltuch certain Kaiser envelopes which she had then taken back, because Franklin said she didn't' know to which union and from which employer the material pertained. As to a second information request pertaining to retirement, Boltuch conceded there may have been some confusion over whether the request had pertained to German/Teamsters or only to German/Machinists. To clear up the confusion, Boltuch restated his request on behalf of German/Teamsters: as to any plans already in existence for nonunion employees, Boltuch requested the names of all covered employees, their job classifications, length of time employees covered by the plan, and the level of contribution by the employee and by the employer. In addition, Boltuch asked whether any such plan was a pension, a profit-sharing, or a 401K plan and if any plan had a descriptive booklet, Boltuch asked that it be produced. Finally, Boltuch requested names and addresses of plan administrators and trustees, plus the history of the rate of return of the plans.

Prior to Boltuch leaving about noon, the parties had a brief discussion regarding where agreement had been reached on the parts proposal. When Allen took over, the discussion turned to seniority for employees promoted out of the unit. Under the old contract, promoted employees could maintain their unit seniority for 1 year, in case they returned to the unit for any reason. German was proposing to delete this employee right to maintain seniority, but German gave no particular reason to support its desire. German was also proposing to lay off employees based upon its assessment of the employee's merit rather than employee seniority.

m. June 14 (German/Teamsters)

At this session, Franklin represented German and Allen represented the Teamsters. German issued its fourth proposals (R.

Exhs. P-13, P-20). The discussion concerned wages for employees. Franklin stated that German wanted discretion to pay employees over scale and discretion to slot employees in either plan A or plan B (hourly pay or incentive pay), without German's decisions being subject to grievance and arbitration.

At the June 21 meeting at the FMCS, German presented its fifth set of proposals (R. Exhs. P-14, P-21), but no formal bargaining occurred. German made minor alterations to its earlier proposals concerning its health and welfare and retirement plans.

n. June 26 (German/Teamsters)

At this meeting, Hulteng and Joe Ryan, also a Littler attorney and Respondent witness, represented German. Allen represented the Teamsters.

The parties bargained over a number of issues at this meeting, such as laundry cost for coveralls which German wanted its employees to pay, a change from the old contract. Later on this proposal was dropped by German. Regarding jury duty, German proposed that employees not be paid. Allen asked how many employees had served on juries in the last 3 years, but German never provided this information. German also proposed that personal leave be capped at 30 days and Allen asked how many employees had taken personal leave and its duration. The Teamsters were not seeking paid time off, according to Allen, but only that this be available for emergencies. Accordingly, the Union saw no need for a cap. As to Allen's request for examples of abuse, Ryan could provide none.

German also desired to reduce employee accrual of vacation pay, another area which Allen objected to.

Finally, German proposed that it have discretion to terminate up to 25 percent of the bargaining unit work force in a 30-day period without just cause. When Allen asked Ryan for the basis for that proposal, he could provide none. According to Allen, Ryan agreed it was an unjust proposal. Ryan testified, however, he told Allen only that he had not drafted that particular section.

Allen said she had to leave at 4 p.m. which she did. There was confusion over whether Allen had agreed to resume bargaining on June 29 or not. Although Ryan testified Allen had so agreed, she failed to appear. Allen testified that the date was tentative only, subject to later confirmation.

o. July 19 (German/Teamsters)

This meeting occurred at the Littler offices with Boltuch and Kuhn representing the Teamsters and Hulteng and Seamans representing German. It began about 10:30 a.m. when Hulteng produced his final proposals (Resp. Exhs. P-15, P-22). As matters turned out, the meeting ended about 1 p.m. when Boltuch and Kuhn learned that Schmitt was meeting with employees to discuss various benefit plans then being negotiated. Hulteng offered to call German and have the meeting canceled so that bargaining could continue. Boltuch rejected this offer saying it was necessary for the Teamsters representatives to go to German to protect employee rights. Then Hulteng offered to resume bargaining later in the afternoon, but Boltuch stated he had a conflict at 4 p.m. So the Union representatives left without a new date agreed upon. Hulteng said the Union's absence was a sham and pretext.[25] Prior to the adjournment, the parties engaged in some bargaining.

In its final proposals, German agreed to pay for employees' time at compulsory meetings and to pay clothing and laundry costs. However, there was no change regarding German's claim for discretion to issue work rules unilaterally, if consistent with the agreement. Boltuch objected that under the Act, the Teamsters were entitled to notice and to an opportunity to bargain, a right they would not waive.

As to vacation pay, there was disagreement over German's proposal regarding how it was to be computed, exclusive of overtime and incentive pay. Hulteng responded that German's intent, which possibly should be spelled out in the proposal was that parts employees would have their incentive pay averaged out for vacation pay purposes. The parties went on to bargain over appropriate language.

Boltuch raised another question regarding how arbitrators were to be selected and asked for specific language on this. Boltuch went on to object to German's proposal to eliminate from the old contract a section permitting leaves of absence. Then the parties turned to the recurring issue of where employees were to be slotted under plan B.

Boltuch then asked for a clarification of information provided by Hulteng in a June 22 letter to Boltuch (GC Exh. 18). At page 12 of the letter, Hulteng indicated for the first time that two service department employees were to be paid a flat-rate option (at German's discretion). No clear explanation was provided.

Sometime during July, the Union learned that German had hired a number of new parts and service employees in apparent violation of the old contract requiring notice to the Teamsters of any new openings. To make matters worse, German failed to give the Union on a timely basis, the names and addresses of the newly hired bargaining unit employees. Apparently, German also was paying the employees below the scale specified in the old contract. In response to all this, the Teamsters filed a grievance on July 24, supplemented with amended claims filed by letter of August 11 from Kuhn to Schmitt (GC Exh. 37). Ultimately, Schmitt resolved the issue by paying the money the Teamsters claimed was due the underpaid employees.

p. August 8 (German/Teamsters)

This meeting occurred at the Littler offices and began about 10:30 a.m., an hour later than scheduled. Boltuch represented the Teamsters and Hulteng, German. German provided its third set of final proposals (R. Exhs. P-16, P-23).[26]\ In the new proposals, German offered to pay for dependent medical coverage and proposed a revised wage offer.

Boltuch asked Hulteng to specify what Hulteng believed to be the key areas in negotiations. Hulteng replied, seniority, hours and overtime, holidays, health and welfare, pensions, profit-sharing, and wages.

Before turning to these areas, Boltuch made certain information requests: as to jury duty for the second time, Boltuch asked for the names of employees who have served and the names of

[25] When Boltuch arrived at German, he found a meeting in progress between Schmitt and almost all parts employees. Boltuch asked Schmitt to cease signing up employees for benefit plans then being negotiated and Schmitt agreed. A few days after this incident, Kuhn wrote a letter to Schmitt complaining further about the matter, summarizing what occurred and making certain information requests relevant to what had occurred at the meeting (GC Exh. 36).

[26] The record contains a second set of final proposals from German to the Teamsters (R. Exhs. P-15A, P-22A). However, there was little or no testimony regarding these as they apparently were not discussed at a bargaining session.

employees who had taken personal leaves. Also requested were copies of job applications for employees who had applied at German, but had not been hired. Still another request was made for the first time for German's wholesale accounts, so the Teamsters could analyze the commission plan.

After lunch, Hulteng did not return and Franklin and Seamans took over. Again the discussion covered slotting of employees, with German representatives claiming unfettered discretion to place employees in classifications and levels which German deemed appropriate. Again German claimed its decision would not be grievable. Franklin rejected a Teamsters proposal to set a wage guarantee for employees under an incentive plan. Boltuch noted that employee wages based on commission presented problems for the Union which based its dues structures on percentages of wages.

Boltuch attempted to put into the contract a provision allegedly agreed to by Hulteng which would preclude warehousemen, drivers, and stockroom employees from working the parts counter. Franklin offered to pay parts employees weekly rather then biweekly, and agreed to pay commission by the 15th of each month. Boltuch testified that German's wage offer for parts/drivers-helpers was effectively cutting wages by $4 to $5 an hour. Franklin rejected the Union's offer for a 35-cent-an-hour wage increase for service. According to Franklin, full-time employees who were changed by German to part-time employees could not file a grievance. Franklin also rejected the Union's request for a 4-hour daily guarantee for part-time employees.

Franklin said German was at a final position and would not move in major areas. She also added she was prepared to bargain all night. Boltuch, however, had to leave at 4 p.m. In a discussion of additional dates for negotiations, Franklin said German was not available any time after August 15.

On August 9, Hulteng wrote to Boltuch giving notice of a lockout of all Teamsters employees on August 14, if no agreement was reached prior to that time. Hulteng went on to write that German intended to implement unilateral changes in terms and conditions of employment on August 15 (R. Exh. C-181). On August 11, Boltuch wrote back denying that impasse had been reached and asking for further negotiations before lockout or implementation (R. Exh. C-201). Boltuch's objections were to no avail as August 8 was the last bargaining session for German/Teamsters and lockout and implementation occurred on the dates noted.

q. May 5 (German/Painters Negotiation)

German and the Painters had a collective-bargaining relationship between 1986–1989 (GC Exh. 38). When the parties met for the initial bargaining session, Mark Van Zevern, Painters business agent and General Counsel's witness, testified that he represented the Painters. German tendered its first proposal to the Painters on this initial date (R. Exh. P-24). As pointed out by General Counsel, in its brief (vol. I, p. 50 et seq.), German sought substantial changes in virtually all major areas and its proposal in general tracked those German made to the other unions. One of these major changes as explained in section 11 of the proposal concerned wages. There German sought discretion to pay its painters in either plan A (flat rate) or plan B, a 15-level hourly compensation plan.

On cross-examination, Van Zevern was asked about flat rate and the Painters. He admitted that in 1986, several auto dealers proposed that flat rate be included in their contracts with the Painters, but the Painters opposed this concept and when several dealers insisted on the flat rate, the Painters choose to strike rather than accept it.

r. May 16 (German/Painters)

On May 15, German issued its [second] proposal, and on May 16, German issued what was captioned as "Employer's Second Proposal" (R. Exhs. P-25, 26). This is the truncated meeting when German met with its three unions, until Boltuch had to leave due to the medical emergency already described.

At this meeting, Boltuch apparently was representing the Painters, and on the Painters behalf, presented the Union's first proposal (GC Exh. 39). In its proposal, the Painters essentially sought to continue the status quo, with increases, of $4 per hour over the life of the contract for journeyman painters and almost as much for body shop helpers, increases in paid holidays by adding 2 more days, and, increases in the amount of pension fund contributions.

s. May 30 (German/Painters)

This session was held at the Littler offices with Van Zevern representing the Painters, and assisted by J. B. Martin of the Machinists. Rechtschaffen represented German, which offered a new proposal, its fourth, during the bargaining (R. Exh. P-27). Van Zevern stated that Attorney David Rosenfeld would be representing Painters in the future (Rosenfeld was not present at the bargaining session) although Boltuch might be authorized on occasion to speak for the Painters on specific issues.

During this session, the parties discussed the entire German proposal with Van Zevern asking many questions. For example, Van Zevern asked why German was seeking an open shop with no provision for union security. Rechtschaffen said it was necessary as many applicants for employment had declined to work there when they learned German had a union shop. In addition, according to Rechtschaffen, many current employees desired to be rid of the Painters. As to tripling probation time, Rechtschaffen explained that German needed the extra time to assess new employees. Additional discussion covered German's desire for input in selection of a shop steward and for limiting access of the business agent to German premises.

As to flat rate, Van Zevern argued that the concept was not suitable for Painters because German employed only three journeymen and several helpers. As to health and welfare, Van Zevern asked for Kaiser documents which Rechtschaffen promised to provide, but never did. Instead, Van Zevern was provided only a summary of the plan. For grievance and arbitration, German proposed a 30-day cap on backpay, stipulating that the loser pay all costs. Van Zevern objected to this on the grounds that an arbitrator might take over 30 days to decide a case, in which event, a winning employer would be prejudiced. Furthermore, the Painters had only filed a single grievance since the Union began to represent painters at German.

German also desired to drop apprentice training, cut jury pay, and require a valid California driver's license to drive cars around the shop. Schmitt who was present, explained that the insurance company required this change. Van Zevern requested a copy of the policy, which Schmitt promised to provide in the future. Also promised for the future were details on German's proposed profit-sharing plan.[27]

[27] Van Zevern requested the names of all potential hirees who refused to work at German if it was a union shop, and the names of all current employees who wanted the Painters out. No names were ever

t. June 8 (German/Painters)

This meeting occurred at the law offices of Rosenfeld, but he did not participate in the bargaining session. Instead Van Zevern represented the Painters and presented the second Painters proposal (R. Exh. 5). In this proposal, the Painters reduced its hourly wage demands, and continued to propose the same items regarding the status quo, in apprentice shop training, in union security, and in pension and health and welfare, for example, with only slight changes from its first proposal.

Rechtschaffen and Ryan represented German at this meeting. The former stated he did not then have information requested at the prior meeting regarding German's health and welfare proposal, but he hoped to have it by the next meeting. Schmitt said as to the 401K plan, no information at all was available, because German was still working on the plan.

German presented its fifth proposal at this meeting (R. Exh. P-28). After discussion, German agreed to withdraw its proposal for an open shop.

u. June 20 (German/Painters)

This meeting occurred at the Littler offices with Rechtschaffen representing German, and Van Zevern representing the Painters. Both Schmitt from German and Hansen from Royal Motors were also present. German presented its sixth proposal (R. Exh. P-29).

Rechtschaffen asked the Painters for their position on flat rate. Van Zevern answered that the Painters didn't object per se to flat rate. In fact, Van Zevern said, since the last meeting, he had gone to German, talked to Painters employees and looked at documents.[28] So now he said he had a good idea how flat rate would affect German painters employees. One issue regarding flat rate concerned potentially unfair dispatching so Van Zevern proposed certain language which would make dispatching of jobs under flat-rate subject to the grievance and arbitration system. This was rejected by German.

Rechtschaffen also made statements regarding flat rate: that both German [and Royal] were at final position regarding flat-rate, and that the concept was cemented in the dealers' minds. In sum, the dealers were willing to discuss only the details of flat rate, not the concept itself. Van Zevern said that flat rate was not acceptable to German employees. After German representatives caucused, Rechtschaffen said the Painters' proposal was rejected in its entirety. Before adjourning, Rechtschaffen asked Van Zevern if the Painters would sign a flat-rate proposal. Van Zevern replied, not this flat rate. However, when Rechtschaffen requested a counter-proposal regarding flat rate, none was made.

On June 22, Hulteng wrote a letter to Van Zevern which reads as follows:

> Mr. Mark Van Zevern (sic)
> Auto, Marine & Specialty
> Painters Union
> Local No. 1176
> Labor Temple, Room 124
> 8400 Enterprise Way
> 1074-A Valencia Street
> Oakland, CA 94621
>
> Re: Negotiations Between Painters Local 1176 and German Motors and Royal Motors
>
> Dear Mark:
>
> As you know, both German Motors and Royal Motors were in attendance yesterday at a meeting which took place at the Federal Mediation and Conciliation Service. We were advised by Commissioner Jacobsen that you were present for a portion of this meeting, but that you were required to leave because of other commitments.
>
> As a result, I do not believe you were present at the time that German Motors and Royal Motors conveyed new proposals to Machinists Lodge 1305. The Employers have determined to make similar changes, where applicable, in their proposals to Painters Local 1176. These changes supplement the additional changes in position which occurred at the last bargaining session between the parties on June 20, 1989.
>
> As a result of these changes, the Employers believe that they have now arrived at a final position in their offers to Painters Local 1176. I have enclosed documents reflecting the final offers of German Motors and Royal Motors to Local 1176. While the Employers do not foresee any additional changes in position, they remain willing to meet with Painters Local 1176 if you believe a meeting would be fruitful. We informed Commissioner Jacobsen of our willingness to meet yesterday, and I believe that she may be getting in touch with you to determine whether you wish to schedule a meeting.
>
> By this letter, German Motors and Royal Motors also provide written notice to Painters Local 1176 of their intent to engage in economic action consistent with federal law in the event that no agreement between the parties is reached prior to the expiration of the current contract. The Employers intend to engage in economic action in order to permit changes in terms and conditions of employment pursuant to Section 20 of the current Collective Bargaining Agreement between Painters Local 1176 and German Motors, and Section 21 of the current Collective Bargaining Agreement between Painters Local 1176 and Royal Motors.
>
> Please feel free to contact me if you have any questions regarding the positions of the Employers.
>
> Very truly yours,
> /s/ Robert Hulteng
> Robert G. Hulteng

[R. Exh. C-45]

Enclosed with the letter was a document which was captioned as German's final proposal to the Painters (R. Exh. P-30). According to Hulteng, German's final proposal contained the following changes as compared to German's initial offer on May 5:

> Section 1–Scope of Union's jurisdiction–language added;
>
> Section 2–Union security–language proposed by Union added;
>
> Section 3–Probation period–reduced from 120 days to 90 days;

provided. The insurance policy which required in-house drivers to have driver's licenses was never provided. Finally, the names of employees terminated between the 30th and 90th day of probation were never provided.

[28] German had provided production reports, flat rate manuals, and other information regarding efficiency of Painters at German Body Shop.

Section 4–Hours and Overtime–language added;
Section 6–Shop stewards–agreement reached;
Section 11–Wages–flat rate compensation levels increased substantially; similar increases in hourly option levels; details on the incentive plan were added;
Section 12–Flexible benefits plan added;
Section 13–401K plan specified for retirement;
MFN clause deleted as requested by Painters.

On June 23, Van Zevern wrote to Hulteng restating, this time in writing, that Rosenfeld would be conducting future negotiations with German and Royal on behalf of the Painters. To accomplish this, the letter went on, Rosenfeld was to have full authority to accept and make proposals, reject or agree to proposals, and to agree to the scheduling of bargaining sessions (R. Exh. C-50).

v. June 29 (German/Painters)

This meeting occurred at the Labor Temple in Oakland with Rosenfeld and Van Zevern representing the Painters, and Hulteng representing German. The meeting began about 2 p.m. and lasted for about 2 hours.

Rosenfeld started the meeting by denying the parties were at impasse and adding that there were outstanding information requests. However, when asked by Hulteng to list the outstanding requests, Rosenfeld made no reply. Later in the session, Rosenfeld complained that the Painters had received only summaries of the health and welfare plans and had not received the names of the new plan administrators who would be replacing Lipman. Hulteng denied that detailed plan documents had been requested up to then.

The parties then engaged in a discussion of flat rate. Rosenfeld said that the Painters had no philosophical opposition to flat rate, and if an appropriate flat-rate proposal was received, the Painters would accept it. Rosenfeld promised to tender a union flat-rate proposal not later than July 5, almost a week after the old contract expired. At hearing, Rosenfeld conceded that prior to June 29, the Painters had taken a strong position that it didn't want flat rate. According to Rosenfeld, no union flat-rate proposal was made on June 29, because Van Zevern needed an opportunity to tell German employees it was coming. Rosenfeld continued, that if the Painters agreed to flat rate, Rosenfeld believed that German would agree to restore the union benefit plans from the prior contracts. I do not credit Rosenfeld's testimony on this point. I am aware of no evidence to reasonably indicate to an experienced labor attorney like Rosenfeld that German would abandon its other major proposals just to get flat rate. Moreover, as will be indicated below, the Painters flat-rate proposal was so different from what German was seeking, it is possible to challenge its characterization as a flat-rate proposal to begin with. Finally, there is no credible evidence to explain why Rosenfeld appeared at his first bargaining session, the day before the old contract expired and almost 2 months after negotiations had begun.

Returning to the bargaining session, I note that Rosenfeld requested a 2-week extension of the contract, but that Hulteng refused and stated that German intended to implement its final proposal on July 5. Rosenfeld stated that the Painters were willing to waive the economic action condition which the contract specified must be taken before implementation. Hulteng expressed doubts the condition was waivable and indicated that German intended to lockout the Painters for a day before implementation. Hulteng then proposed meeting on any days between June 30 through July 4, but Rosenfeld was not available.

On June 30, Hulteng wrote a letter to Rosenfeld which reads as follows:

David A. Rosenfeld, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery Street
San Francisco, CA 94111

Re: Negotiations Between Painters Local 1176 and German Motors and Royal Motors

Dear Mr. Rosenfeld:

I am writing to follow up on our meeting of June 29, 1989. At that meeting, Painters Local 1176 made one proposal on one subject (contract expiration). That proposal was discussed and rejected.

You also asserted that Local 1176 was considering a proposal on the subject of flat-rate compensation, and that such a proposal would be made by close of business July 5, 1989. You indicated that you could not make a proposal prior to that time, because the Union wanted to discuss the flat-rate issue with its members.

As I told you at the bargaining table, it is far too late in these negotiations for the Union to delay proposals on the single central subject—flat-rate compensation. If, after two months of negotiations, the Union has not yet sought its members' views on this subject, it is apparent that the Union has not approached the negotiations with any seriousness.

Further, you informed me that any flat-rate proposal made by Local 1176 would not be the same as the proposals made by the Employers. As I also told you at the bargaining table, the Employers are at a firm and final position in these negotiations, particularly on the issue of flat-rate compensation. The Employers are not prepared to accept any proposal on flat-rate compensation other than Employers' final proposal. Any other proposal will be rejected.

This will confirm that the Employers offered to meet with the Union on June 30, July 1, 2, 3 or 4. You told me that the Union was unavailable to meet at any of those times, despite the fact that the contract is expiring on June 30. I informed you that the Employers were willing to hold off on any unilateral changes in terms and conditions of employment until July 5, but no longer than that. Nonetheless, you indicated that the first time the Union was available to meet was at 5:00 p.m. on July 6, 1989.

Unless circumstances change, I see no purpose in scheduling a meeting on July 6. As I informed you, the Employers are at a firm and final position in these negotiations. The only potential proposal you mentioned was on the subject of flat-rate compensation, and you admitted that it would be different than the Employers' proposals. I have already told you that any proposal which differs from the Employers' proposals on this subject will be rejected. Accordingly, it does not appear that any meeting would be fruitful.

If you have any additional thoughts or requests, please feel free to contact me.

Very truly yours,
/s/ Robert G. Hulteng

Robert G. Hulteng
[R. Exh. C-62]

On July 3, Rosenfeld sent a seven-page (single-spaced) letter to Hulteng which purported to summarize the negotiations of June 29. Two specific points in the letter merit mention: that the Painters would tender a flat-rate proposal prior to close of business on July 5, pages 2–3; that the Painters were lacking important information–name of new flexible benefit administrator —page 1; business records showing employee efficiency, page 2; German Motors profit-sharing plan, page 3; salaries for all German employees covered by health plan and Kaiser Health Plan Service Agreement, page 5 (R. Exh. C-64).

On July 5, Rosenfeld wrote a letter to Hulteng, a letter not received until July 7. The letter reads as follows:

Robert G. Hulteng, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California Street, 20th Floor
San Francisco, CA 94108-2693

Re: Royal Motors/German Motors and Painters Union Local No. 1176
(Flat Rate Proposals)

Dear Mr. Hulteng:

In our last negotiation session we promised to provide you a flat-rate proposal.

Our flat-rate proposal is as follows: (1) The base labor rate shall be increased .75¢ per hour on each anniversary date for a three year contract; (2) flat-rate hours will be based upon the Mitchell manual; (3) comebacks shall not include work which is not included in time estimates according to the Mitchell manual; (4) comebacks shall be subject to the grievance procedure and (5) the employer shall have the right to pay anyone above the minimums established.

As you can see, this is a substantial proposal. It encompasses the flat-rate concept and is generally consistent with your proposals. We believe this will go a long way to resolving this agreement particularly in light of our prior statements to you that we were not unalterably opposed to the flat-rate system.

We look forward to discussing this proposal as well as your other proposals at our next bargaining session.

Sincerely,
/s/ David A. Rosenfeld
David A. Rosenfeld
[R. Exh. C-66]

On July 5, Hulteng wrote back to Rosenfeld stating that as to the profit-sharing plan, German had tendered to the Painters all the documents which exist (CP Exh. 6). A second letter dated July 5 from Hulteng to Rosenfeld reads as follows:

David A. Rosenfeld, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
I875 Battery Street
San Francisco, CA 94111

Re: Negotiations Between German Motors and Painters Local 1176

Dear Mr. Rosenfeld:

I am writing for the purpose of providing you with official notification that German Motors has today implemented new terms and conditions of employment for employees represented by Painters Local 1176. The new terms and conditions of employment are being implemented pursuant to prior notice provided to you and your client, and following economic action taken by German Motors on July 3, 1989.

Effective with the beginning of the workday today, all provisions of the Employer's final offer to Painters Local 1176 have been implemented, except for the following provisions: Section 2 (Union Security), Section 8 (Grievance Procedure, Adjustment Board and Arbitration), and Section 22 (Expiration and Revision).

Additionally, the Employer has not implemented the flexible benefit plan provision contained in Section 12 (Health Insurance); all other provisions of Section 12 are being implemented.

The Employer sees no purpose in further meetings at this time. If the Union believes at some point in the future that a meeting would be productive, please contact Commissioner Jacobsen of the FMCS.

Late on the afternoon of July 3, 1989, a letter from you was telecopied to my office. I will be responding to that letter by separate cover.

Very truly yours,
/s/ Robert G. Hulteng
Robret G. Hulteng
[R. Exh. C-68)]

On July 14, Hulteng wrote a third letter to Rosenfeld (10 pages, single spaced), in effect denying all or most of the allegations raised by Rosenfeld in the July 3, and two other letters (R. Exh. C-105).

On August 2, German issued its eighth proposal (second final) to the Painters (R. Exh. P-31). In this document, German changed its position regarding health insurance for dependents which German was now willing to pay for after a new employee had been employed for 3 months.

4. Bargaining sessions—Honda

Unlike Royal and German, Honda did not have a collective-bargaining relationship with the Painters. It did, however, have collective-bargaining relationships with the Machinists (1986–1989 agreement, GC Exh. 54) and with the Teamsters (1986–1989 Service Agreement, GC Exh. 46; 1986–1989 Parts Agreement, GC Exh. 47). Boltuch participated on behalf of the Machinists and Teamsters on the May 5 opening day of negotiations. There, Honda tendered its first proposal (R. Exh. P-32) which generally tracked the proposals of Royal and German. Honda's proposal contained reference to a cafeteria plan which Honda deleted. Hulteng made two other clarifications: he corrected section 14 (tool insurance deductible) from $50 to $500, and he made a change regarding jury duty. Before adjourning the parties agreed on May 15 as the next bargaining session.[29]

Before the parties gathered for the next meeting, Boltuch prepared a document for the Machinist employees at Honda labeled "Takeaways" (GC Exh. 55). Again, Boltuch complained of various elements of the proposal such as open shop, employer input in selection of shop steward, potential discipline, including discharge, for lack of efficiency, wages at employer's option, either flat rate or 15-tier hourly rate with substantial reductions, change in health insurance to a nonunion

[29] As already mentioned, no Teamsters proposals were ready for the May 5 meeting.

plan, substitution of profit-sharing for pension plan, and a 5-year term of contract with no wage increases.

a. May 15 (Honda/Machinists)

This meeting began in mid-morning with Boltuch representing the Machinists and Hulteng, Honda. The latter presented its second proposal (R. Exh. P-33) and the Machinists presented its first written proposal (GC Exh. 56). In its proposal, the Machinists essentially relied on the status quo with increases: for example, wage increases of $1 per hour for each of the 3-year term of the contract and pension contribution, increases of $40 per month each of 3 years, and deleting of all bonus and incentive programs from the contract. In addition to its written proposal, the Machinists made an oral proposal through Boltuch, which was reduced to written form at the meeting (GC Exh. 57). This proposal dealt with procedures for selection of an arbitrator and procedures for Honda to implement a roadside service program.

At this meeting, Honda's Teamsters service and parts proposals were available (R. Exhs. P-42, P-49), and Teamsters proposals to Honda were also available (GC Exhs. 67 (service), 68 (parts)). (Most of the afternoon session was spent discussing Honda/Teamsters.)

The subject of information requests came up with Hulteng exhorting Boltuch to have the requests in as soon as possible. Hulteng made a few himself, asking about the status of negotiations between the Machinists and certain other Bay Area dealers.

Besides roadside service which Honda did not then have available for its customers, the parties also discussed physical examinations for bargaining unit employees which Honda was proposing, and an appendix to the 1986–1989 contract providing a flat-rate bonus to mechanics under certain conditions.

On May 16, Honda produced a "Revised" first proposal to the Machinists (R. Exh. P-34). Under this proposal, Honda had the option at its expense of requesting employees to undergo an annual physical examination with the results to be disclosed to health insurance providers.

b. May 30 (Honda/Machinists)

Once again the parties convened with Boltuch and Hulteng representing their respective sides. The meeting lasted from 1:30 p.m. to almost 7 p.m. when Franklin had to leave. Honda produced its third proposal to the Machinists (erroneously called its second) (R. Exh. P-35).

Part of the discussion concerned compensation for service writers and the number of service writers to be employed. In accord with Boltuch's desire to pay each service writer a percent of the pool of sales, Boltuch proposed a limit on the number of service writers to be employed, so as not to dilute the percent available to each, but Franklin refused to commit in writing to a specific number.

Honda's proposal provided that shop stewards were to be selected only by the Machinists and that employees were to be covered by the Boas pension plan rather than by the 401K plan as previously proposed. Boltuch indicated he had several information requests regarding the pension plan.

Boltuch attempted to make an oral counter-proposal dealing with wages and other subjects which Boltuch referred to as plan A and, alternatively plan B. However, before he could complete his proposal, Franklin, who had replaced Hulteng had to leave for the day.

As to temporary employees, there was some vague agreement in concept to allow for the ebb and flow of work by hiring temporaries. As to meetings, Boltuch requested pay if the meeting was compulsory and no discipline if an employee failed to attend a voluntary meeting. Finally, Boltuch reiterated that the Machinists had a statutory right to bargain over new work rules and that the Union would not waive that right.

c. June 9 (Honda/Machinists)

On this date, Honda issued its fourth proposal (R. Exh. P-36). Between 1:30 p.m. and 6:15 p.m., Boltuch and Hulteng met to bargain at the Littler offices and discussed some of the changes in Honda's latest proposal: Honda made certain changes in jurisdiction and eliminated its earlier proposal for an open shop and in its place inserted a union security clause. In addition, the parties agreed that an employee would lose his seniority if he voluntarily left Honda. Probation was proposed as 90 days, to be extended by mutual agreement; just cause was added for discharge and discipline, and Honda agreed to give the Union 5 days' notice for layoffs or discharge. Honda made a new proposal to pay employees time and a half for hours in excess of 8 hours per day and/or 40 hours per week (subject to certain qualifications); also new was Honda's proposal that employees need not be required to provide power hand tools or heavy equipment. Finally, Honda agreed to delete the MFN clause as the Machinists had desired.

Much of the session dealt with information requests, both new and old. As to the former, Boltuch asked several questions regarding the Boas pension plan such as names of trustees, amounts of employer contributions, etc. Boltuch also requested information on how mechanics would be slotted into the Honda pay proposal. As to outstanding information requests, Boltuch complained that information on tool insurance, such as the name of the administrator of the plan, and information relative to physical exams for employees had never been provided.

Boltuch made an oral proposal at this meeting: (1) all items, agreed upon to date; (2) noneconomic language such as length of probationary period could be worked out later, (3) regarding health and welfare, put Automotive Industries plan back on table which Honda eventually did and negotiate later on who would pay increased cost; (4) regarding pension plan, reinstate former plan with contribution of $207 per month and negotiate later on increase; (5) regarding apprentice training fund, Honda had proposed abolishing, but Boltuch proposed leaving issue open with Honda continuing to contribute to fund and negotiate on ultimate fate later; (6) retiree health and welfare contributions had been $18 month and Honda wanted to discontinue; Boltuch said put back in contract and negotiate later on whether any increase to $18 per month payments; (7) length of contract should be 3 years; (8) as to wages, place back on table, current wage rates and parties can negotiate later on increases, while at Honda's option, keeping flat-rate bonus system from old contract appendix (Tr. pp. 2014-2015). After a caucus, Franklin rejected Boltuch's proposal, but countered on health and welfare. Honda would agree to continue from old contract, the Taft-Hartley plan (Automotive Industries plan), but Honda's contribution would be frozen at current levels during the life of the new contract. Before she left, Franklin reiterated that Honda really wanted flat rate as part of its new contract.

d. June 15 (Honda/Machinists)

At this session, Boltuch represented the Union and Hulteng and Franklin represented Honda. The session was held at the

Teamsters Hall in Daly City. Boltuch began by asserting that although the Union didn't like flat rate and was not prone to accept it, the Machinists were willing to bargain over flat rate. Then the parties discussed flat rate, but reached no agreement.

Then Honda made a new proposal regarding a review committee composed of employees and management to oversee discipline and discharge. Boltuch rejected this on the grounds that the employees didn't want it. When the parties turned to a discussion of Honda's proposal on service writers and dispatchers, Boltuch said, "Roger [Boas] is into fucking people." As to the Boas pension plan, Hulteng stated that Honda would contribute $100 per month per employee. When Hulteng asserted that the Boas pension plan was better than the old plan, Boltuch asked for the names of any experts who said so. Hulteng also asserted that under Honda's proposals, it desired to reduce the number of paid holidays because under flat rate, employees would make more money.

The parties reached agreement on one element of Honda's proposal, regarding the assignment of mechanics to service teams within Honda's discretion. Boltuch agreed to this so long as there was no impairment of a mechanics' wages, hours or other terms and conditions of employment.

Boltuch complained during the session that he was still waiting for previously requested information regarding flat rate, and the service manuals used to compute flat rate and slottings of Machinists under the new pay plan.

On June 21, the parties, including representatives of all three dealers, met at the FMCS. Honda presented its fifth proposal at this meeting (R. Exh. P-37). Among the changes contained in this proposal was Honda's increase in the hourly guarantee from $8 to $10 per hour; additional paid holidays; and Honda's agreement to make contributions to the health and welfare funds existing under the 1986–1989 agreement.

e. June 26 (Honda/Machinists)

This meeting was held at the FMCS with Commissioner Jacobsen in attendance. Boltuch represented the Union and Franklin represented Honda. The meeting began at 10 a.m., but Boltuch announced that he had to leave at 12:30 p.m. in response to a court subpoena. The parties were working off Honda's June 22 proposal, its sixth and the first to be captioned "Final" (R. Exh. P-38). At Boltuch's request, Franklin prepared a three-page handwritten document purporting to recite the differences between Honda's June 9 and 22 proposals (GC Exh. 63). Franklin gave the document to Jacobsen who in turn conveyed it to Boltuch. None of the changes referred to could be characterized as a breakthrough.

Before Franklin left, Boltuch asked when Honda would be locking out employees. Franklin responded that due notice would be given.

On June 27, Hulteng called Machinists official, J. B. Martin and offered to extend the Honda agreement for an additional month, because Boas was planning to take a more active role in management and because a new general manager had just been hired. This was Williams Boggs, who testified for Respondents, as did Boas. Hulteng continued that Boggs needed time to become familiar with the issues. Hulteng continued to say that with the additional time, Honda would be willing to reconsider its position on hard subjects, such as flat rate. Martin responded positively and said that either he or Boltuch would call back.

During the evening hours of June 27, Boltuch called back, first of all to protest Hulteng's talking directly to a representative of Boltuch's client. With that over, Hulteng repeated what he had told Martin and added that Honda would be redrafting some or all of its proposals. Hulteng told Boltuch that when the parties met again, Honda would concentrate on three key issues: (1) elimination of bonus provision in the appendix of the 1986–1989 agreement; (2) restricting of service writers compensation from hourly wage to commission; and (3) emphasis on increasing efficiency of mechanics. Boltuch recalled Hulteng saying that Honda intended to repropose the pension plan and the health and welfare plan from the old contract when the parties next bargained, but Hulteng denied ever making such statements. Based on the wording of Boltuch's June 29 letter referred to below, I am convinced Boltuch was mistaken regarding Hulteng's alleged statements about the withdrawal of the Boas pension plan and the proposed health and welfare plan. Accordingly, I credit Hulteng's denials about that portion of the telephone conversation.

On June 29, Boltuch wrote a letter to Hulteng confirming the June 27 telephone conversations. Among other subjects confirmed was Boltuch's agreement to extend the 1986–1989 Machinists and the two 1986–1989 Teamsters contracts up to and including July 31. Boltuch also noted the parties had agreed in the phone call to meet again at the Littler offices on July 10 at 9 a.m. Finally, pending receipt of Honda's new proposals, and with the exception of certain materials relating to the Honda pension and 401K plans which Honda was then proposing, Boltuch stated in the letter that he was holding in abeyance any and all pending information requests but that they were subject to renewal (R. Exh. C-59).

On June 28, the parties executed written extensions for Honda/Machinists and Honda/Teamsters up to July 31 (R. Exhs. 31a, b).

f. July 10 (Honda/Machinists)

This meeting was held at the Littler office with Jacobsen present. Hulteng represented Honda and Boggs was present for his first negotiating session. Boltuch represented the Union with the assistance of Martin and Shmatovich. The parties were working from Honda's latest proposal issued June 27 and labeled as Honda's second final (R. Exh. P-39). Jacobsen told Boltuch that Honda would not be making new proposals at the meeting, but were awaiting the Union's proposals. This information was contrary to what Boltuch understood Hulteng to say over the phone on June 27. However, Hulteng testified he had not had sufficient time to formulate new proposals.

Boggs and Martin exchanged points of view relative to efficiency. Hulteng set the stage for the discussion by stating that Honda's efficiency was much lower than other Honda dealers. Martin said part of the problem was inadequate training and Boggs agreed. Hulteng made a reference to negotiation between the Machinists (different local) and Diablo-Mazda (D/M), a dealer located in Contra Costa County, east of San Francisco. Hulteng asked if the Machinists would make the same proposals made by the Machinists to D/M, with respect to efficiency. Boltuch made no direct reply except to say the Union desired to keep efficiency and flat rate separate. Martin added that if Honda attempted to implement flat rate, the Union would go to "fucking war." About this time, Hulteng stated that Honda intended to withdraw its flat-rate proposal.

Towards the end of the session, Boltuch made an oral proposal which was similar to the old collective-bargaining agreement with minor modifications, such as a separate Machinists

efficiency proposal. Under this proposal, Honda would notify the Union if an efficiency problem exists and an employee could be subject to discipline with an entitlement to automatic grievance through steps one and two. Hulteng had to leave at 4 p.m., but before the meeting adjourned, Boggs said the Union offer was "short."

g. July 20 (Honda/Machinists)

Honda issued its third final proposal on this date (R. Exh. P-39A). The proposal took flat rate off the table, and in its place proposed an hourly wage plan, increased service advisor draw, eliminated the bonus plan which had been in the old contract appendix and made certain other changes. The parties convened at the FMCS with Commissioner Carpenter replacing Jacobsen who had left government service. Boltuch represented the Union and Hulteng and Seamans represented Honda. The meeting began about 10 a.m., about 30 minutes late.

Hulteng began by saying Honda was at final position and no further movement was contemplated. Boltuch noted that Honda's latest final proposal contained a new provision on dispatchers who were to be paid based on mechanical labor gross profit.[30] Because the Union had not seen this before, Boltuch stated it was arrogant for Hulteng to assert Honda was at final position. Ultimately, Hulteng agreed with this contention, saying Honda was not at final position as to this particular element of the proposal.

Boltuch noted that while flat rate was off the table, Honda was still proposing a MFN clause which meant that the Machinists were still liable for flat rate if they agreed to it with any other employer. Hulteng testified that the Union never specifically requested that MFN be deleted. I find, however, that Boltuch's remarks would have reasonably implied that the Union desired the MFN clause removed from the contract.

Boltuch also noted that he received reports that Boas had been talking to bargaining unit employees about such subjects as Honda wanting a 4-year contract. Boltuch added that in light of what he believed to be unlawful acts by Boas, any strike of Honda would be an unfair labor practice strike. Hulteng asked for union proposals, but Boltuch said it appeared to be futile to make proposals with Hulteng asserting Honda wouldn't move. Further, Boltuch complained that he had made a full oral proposal at the last meeting, but that no real bargaining had occurred over its contents.

Hulteng contended that with flat rate off the table, Honda desired to focus on efficiency, quality of work, and service writer compensation. Hulteng continued that if an employee fell five percent or more below shop average on efficiency, the person was subject to discipline, but only discipline resulting in discharge was subject to grievance.

Finally, Littler Attorney Seamans who was in charge of responding to the Union's information requests said that the Machinists could reexamine information regarding non-Honda suppliers which had been first produced on June 22. Teamsters representative Kuhn had been at Honda on that very day looking at information on parts gross profit.

During the Union caucus, Carpenter told Hulteng that the Union wished to leave without reconvening. When Hulteng objected, Boltuch returned to say that he had to leave, but could stay for 5 more minutes. Hulteng stated that no additional meetings were necessary since the Machinists had presented no proposals on July 20. However, if the Machinists wished to present any additional proposals in the future, Honda would consider agreeing to additional bargaining sessions.

On July 25, Hulteng wrote to Boltuch enclosing a copy of Honda's final offer, which incorporated changes made at the last bargaining session on July 20 (R. Exh. C-141). The final offer enclosed with the letter was the fourth final and the ninth proposal to the Machinists (R. Exh. P-40). Hulteng concluded his letter by saying "the Employer does not foresee any additional movement from this final proposal." In the proposal, Honda changed the method of computing wages for dispatcher trainees to include five different rates of commission and weekly draw depending on length of service.

h. August 4 (Honda/Machinist)

On this date the parties met at the Littler law firm with Boltuch representing the Machinists and Franklin and Seamans representing Honda. Franklin began the meeting by stating that Honda was at final position, but that it was ready to consider any Machinists proposals. Boltuch complained that not all subjects in the proposal had been discussed. Boltuch continued that the Machinists would agree to Honda's proposal to eliminate the bonus provision from the old contract. For its part, Honda agreed to eliminate the MFN clause, but stated it wanted additional union concessions on service writer compensation based on commission, and on increased efficiency.[31]

Boltuch then made a verbal counteroffer: as to service writers compensation, change $750 per week draw to $150 per day with $20 increase per year for the second through fifth years of the contract, commission not to be based on pool, but to be based on individual sales, protections to be built into the contract for three current service writers so that if additional service writers were hired [stacking the unit], instead of having the current commission diluted, Honda would agree to increase the commission, language to restrict Honda's authority to increase the hours of service writers beyond 40 hours per week, specify in contract that dispatcher trainees to receive progressive wages; mandatory meetings to be paid time, discipline short of discharge to be subject to grievance and discipline for comebacks to be imposed only if fault of employee and only if employee efficiency lower than 98 percent, work assignments to be made be made on impartial basis.

All or most of these proposals were rejected by Franklin, including those where Boltuch was seeking a clarification in the contract of matters that Honda had already agreed to. At one point during a union caucus, Boltuch called Mike Day, to confer with him about what the Union would authorize Boltuch to do. Boltuch told Franklin that Day and he would have to consult further in person, after which Boltuch would be prepared to make two full alternative offers. At the conclusion of the meeting, the parties had not agreed on exactly what elements of discipline would be subject to grievance and arbitration, nor had agreement been reached on compensation for service writers and dispatchers.

[30] Also Honda proposed a new classification: dispatcher trainee to be paid $400 draw per week against commission. After a caucus, Hulteng proposed wages on a 4-year progressive rate to full dispatcher.

[31] The record does not clearly indicate whether the MFN clause was removed from Honda's proposals during the meeting of June 9, as Boltuch first testified (Tr. p. 1999), or during the meeting of August 4 as Boltuch later testified (Tr. p. 2310). In any event, during the meeting of July 20, the subject of MFN clause was apparently discussed (Tr. p. 2279).

On August 10, Franklin sent a letter to Boltuch enclosing Honda's final proposal (R. Exh. P-41), as modified orally at the table on August 4. In the proposal, Honda modified the service writer compensation language reflecting that the commission percentage was to be based solely on each individual's service writer's work. Franklin continued in her letter to state, again, that the Employer was at final position and did not believe that further negotiations would be fruitful, but accepted Boltuch's invitation to meet on August 14 (R. Exh. C-190). In another letter of August 10, Hulteng wrote to Boltuch noting that Boltuch was not available on any date prior to August 14. Hulteng continued in his letter to say that if agreement was not reached, Honda intended to take economic action [i.e., lockout employees] on August 15 and to implement unilateral changes in terms and conditions of employment on August 16 (R. Exh. C-191). The proposal sent to Boltuch was Honda's tenth proposal and its fifth designated "final."

i. August 14 (Honda/Machinists)

The parties met at the Engineers and Scientists Hall in San Francisco, beginning the meeting about 10:30 a.m., 30 minutes later than scheduled. Boltuch represented the Machinists and Franklin represented Honda. Franklin began negotiations, as in the past, by announcing that Honda was at final position and by asking Boltuch if he was prepared to sign Honda's proposal of August 10. Boltuch said he wouldn't sign it nor recommend ratification. Boltuch testified that he did not know if the Machinists ever did vote on the August 10 offer.

Boltuch did make some proposals at this meeting. Boltuch made package proposals characterized as plan A and plan B, which was based on Boltuch's conversations with Mike Day. As to option A, Boltuch proposed no wage reduction for a year for mechanics and service writers; for mechanics, change four levels to two, journeymen and trainees. As to slotting of employees, Boltuch proposed that Honda has the sole right to place an individual at a level greater than the employee's experience would require; Machinists to agree to term of 5 years for contract; Boltuch proposed for mechanics, wage increases over 5 years, beginning at $19.25 per hour; combine dispatchers and service writers, and Union to agree to commission rather than hourly; over 45 hours per week equals overtime; comebacks defined and mechanics working at 100-percent efficiency not subject to discipline for comebacks.

As to option B, take all language and terms agreed upon to date. Use the British Motors proposal (GC Exh. 64) which had previously been implemented by British Motors in its negotiations with the Machinists to make offers in the instant negotiations. In addition, Boltuch proposed a 365-day cap on backpay rather than 90 days as proposed by Honda and that arbitrators be selected as needed from a list to be maintained by FMCS or the parties to agree on a permanent arbitrator.[32]

At the end of the lengthy offers, Franklin told Boltuch that the offers could have been made in May as they were not dependent on answers to information requests. Franklin continued that she didn't consider Boltuch's options A and B to be serious attempts to reach agreement so Honda would make no counteroffer. In response to Boltuch's request for Franklin to correct certain typographical errors in the August 10 proposal, Franklin refused, saying that no changes were warranted in the final proposal. Franklin concluded by saying we reject everything; the parties are at impasse. To this Boltuch responded that Honda didn't want to reach agreement and planned to go nonunion at some point in the future.

On August 16, Hulteng wrote to Boltuch with notice that as of same date, Honda implemented substantial portions of its final offer to the Machinists, i.e., all portions of its final offer, except for section 2 (Union Security), section 10 (Grievance Procedure Adjustment Board and Arbitration) and section 27 (Contract Term). This was done, the letter concluded, because of "the continued impasse in negotiations between the parties and after engaging in economic action on August 15." (R. Exh. C-211A).

j. Honda/Teamsters

As is by now well known, Boltuch and Hulteng met on May 5 with representatives of the three Respondents present. No bargaining occurred and no Teamsters proposals were ready. The parties agreed to meet again on May 15. Honda issued its first proposals on May 11 for service (R. Exh. P-42) and for parts (R. Exh. P-49). The Teamsters presented its first proposals on May 15 (GC Exhs. 67 [service], 68 [parts]).

The May 15 bargaining session began about 10:25 a.m. with Hulteng asking if the Teamsters would agree to combine its two units into one. Boltuch refused and then summarized how the Teamsters proposals differed from the 1986–1989 agreements. Little bargaining occurred on this date as the Machinists had taken up the morning session and the Teamsters the afternoon. The session ended at 4:15 p.m. On May 16, Honda distributed proposals to the Teamsters (R. Exhs. P-43 [service] and P-50 [parts, titled Revised First Proposal]). Boltuch prepared his customary "Takeaways" letter, but only the one for service is contained in the record (GC Exh. 48). In the document, apparently distributed to bargaining unit employees, Boltuch complained of an open shop, 120-day probation period with layoffs at Honda's discretion, Honda's input in selection of shop steward, reductions in paid holidays, deletions of major medical and Kaiser (HMO) option and Teamsters pension plan, a provision reading, "Employer shall not terminate more than 25% of the work force within 30 days," subcontracting at Employer's discretion, and certain wage levels, with Employer discretion to slot employees.

k. May 24 (Honda/Teamsters)

This meeting was held at Teamsters Union hall in Daly City with Hulteng, Franklin and Rechtschaffen representing Honda and Boltuch representing the Teamsters. Beginning at 10:25 a.m., the meeting first of all covered Honda's second set of proposals to Teamsters (R. Exhs. P-44 [service], P-51 [parts]). Hulteng described these new proposals as "state of the art." Then Franklin explained how the new proposals differed from prior proposals. Unlike Royal and German, Honda was not proposing a cafeteria plan. As to the health and welfare plan, Honda was proposing either the Northern California Motor Car Dealers Association (NCMCDA) plan or Kaiser HMO. The former had previously been available to Honda's nonunion employees. Boltuch requested all relevant documents relative to the health and welfare plan and received these on June 14. During the session, Boltuch made counterproposals relevant to certain sections and Hulteng responded.

l. June 8 (Honda/Teamsters)

This meeting began about one hour late at 10:30, apparently because Franklin was somewhat late and because of an em-

[32] I have recited the major points of Boltuch's options A and B.

ployer caucus immediately after she arrived. Franklin represented Honda and Boltuch represented the Teamsters. After the meeting finally began, Honda distributed its third set of proposals (R. Exhs. P-45 [service], P-52 [parts]). Franklin then summarized the changes in Honda's proposals made by the current proposals: reinstatement of the union-security clause; probation period shortened to 90 days and to be extended by mutual agreement; Employer discretion to schedule four 10-hour days; revise shop steward selection method; delete training section which apparently pertained more to the mechanics; add "just cause" for discipline and discharge; increase wages for service employees.

Before the meeting ended at 2 p.m. because Franklin had to leave early, Franklin stated she had no cost information as to whether Honda's proposed health and welfare plan was less expensive than the Teamsters had been. Nor did Franklin have information on where service employees would be slotted under the new proposal. Boltuch made a hurried counterproposal before Franklin left: term of the agreement to be 3 years, keep current health and welfare plan, and current joint trustee pension plan, Honda to prepare a short list of problems with the Teamsters bargaining units and finally, the parties to negotiate increased wages.

On June 14, Hulteng sent a letter to Boltuch purporting to respond to Teamsters information requests regarding slotting and pensions (GC Exh. 49). As to health and welfare cost information, Hulteng wrote, "Since the Employer has agreed to pay the Union's health and welfare benefits plan, a response to this question is unnecessary." Apparently this was not accurate information. Franklin had agreed to reinstate the Union's health and welfare plan only if the Teamsters agreed that employees would pay any increased costs over the life of the agreement. Boltuch had not agreed to this condition, so the information request was still valid.

m. June 16 (Honda/Teamsters)

On this date, Franklin represented Honda and Boltuch represented the Teamsters. Although scheduled to begin at 9:30 a.m., the meeting didn't start until 10:45 a.m. Then Boltuch had to leave at 5 p.m. While the parties were negotiating, Honda produced its fourth set of proposals (R. Exh. P-46 [service], P-53 [parts]). Among the changes described by Franklin at the table was allowance for the union steward to spend up to 10 days per year on union business without pay, and instead of 24 hours' notice requested for a union business agent to visit Honda, the proposal called for "reasonable notice." Franklin also pointed out that the Union's health and welfare plan from the old contract was reinstated (apparently without any conditions) and the arbitrator had increased authority to award backpay up to 90 days.

Honda added a new section relating to a review committee with authority to review employer decisions regarding discipline or discharge. This was to be substituted for the grievance and arbitration provision. Boltuch objected claiming the provision was illegal under Federal labor law.

For the first time Honda proposed that the parts employees, instead of being paid hourly wages, were to be paid commission, based upon a certain percentage of gross profit generated by the department. Boltuch made a number of information requests about this new plan. Based on information supplied by an employee-member of the Union's bargaining committee, Boltuch raised questions regarding Honda's discounting parts to certain customers. If true, this practice would reduce gross profit and reduce employee commission income. Boltuch noted that commission pay systems had been a major issue in 1986, but that all or most dealers eventually withdrew them. Boltuch made counteroffers on some items like the grievance procedure.

Before adjournment, Boltuch said that so far as the Teamsters were concerned, there were three critical areas in negotiations: health and welfare (only small clarification needed), pension, and wages (Tr. p. 1832).

On June 19, Boltuch wrote to Hulteng complaining as to Honda/Teamsters, that Honda's response to Boltuch's information requests had not been adequate (GC Exh. 50, pp. 4-5).

On June 21, all parties met at FMCS, but as to Honda/-Teamsters, no bargaining occurred. At some point during this meeting, Honda presented its fifth set of proposals to the Teamsters (R. Exhs. P-47 [service], P-54 [parts]).

I have recited above the facts and circumstances surrounding the extensions of the Teamsters and Machinists contracts. I repeat here that the parties signed documents extending the service and parts agreements to the end of July (R. Exh. 31b).

n. July 14 (Honda/Teamsters)

This meeting held at the FMCS was scheduled to begin at 9:30 a.m., but did not actually begin until about 10:30 a.m., due to Franklin's tardiness. She was representing Honda with Boltuch representing the Teamsters. Franklin said she would be working from the June 21 proposals but Boltuch protested that Hulteng had said in a phone conversation on June 27, that Boas intended to change Honda's proposals and become more active in negotiations. Without directly responding to Boltuch, Franklin began a summary of the changes contained in the June 21 proposals which up to that time had not been discussed at a bargaining session: vacation benefits had been expanded consistent with the old contract; for parts employees, Honda persisted in its commission plan, but did include an increase in wages for the assistant parts manager. Then Franklin returned to the wage scales within a five-level plan. The amounts proposed within these levels were not to Boltuch's satisfaction. Franklin also referred to outside sales drivers; a new classification contained within the latest proposal and which Boltuch had not seen before. As to the health and welfare plan, Honda was now proposing that it would pay half of the increased costs. No changes were proposed on the pension plan, contrary to what Boltuch said he was told by Hulteng. Part of the confusion over the pension plan related to the amount of the employer's contribution: either $100 per employee per month as per June 14 letter from Hulteng to Boltuch (GC Exh. 49), or 2 percent per employee as Franklin told Boltuch on July 14 (Tr. pp. 1855-1856), or no guarantee of any amount, as Franklin later stated on July 14 (no specific amount would be placed in the contract) (Tr. p. 1857). Finally, Boltuch complained that Boas had been holding employee meetings at work giving employees different information from what was being stated by Honda's representatives across the table.

As a result of the above, much of which displeased Boltuch, he made certain statements about Boas who was not present at the July 14 session. Boltuch said he was going to attack Boas verbally, regarding his nolo plea to having had sex with female minors. Boltuch continued this theme: he wouldn't let Boas screw the employees as he had screwed the teenagers. Directly to Franklin, Boltuch said, "let Boas go fuck another 12 year

old"; referring to Boas, Boltuch said, "fucking asshole, should have been put in jail."

In support of Honda's evidence regarding Boltuch's behavior and statements at the July 14 session, Respondents called as a witness Joseph Robles, an employee in the Honda parts bargaining unit for 20 years, union shop steward for 5 years, and member of the Teamsters for 39 years. Robles had been present as part of the union bargaining committee, a position he assumed at the request of Teamsters business agent, Bruce Kuhn. Robles corroborated the testimony of others given as to Boltuch's statements about Boas. In the opinion of Robles, based on his attendance at three bargaining sessions, he felt the bargaining was making no progress. Robles also attended two union meetings during negotiations, the last one was at a Teamsters hall in Daly City. At this meeting, a Teamsters official named Dave Powell spoke to Honda parts employees and said the major issue was the Boas pension plan which the Teamsters did not want to replace the Teamsters pension plan in the old contract. According to Robles, the parts employees voted by secret ballot, 100 percent in favor of a strike at Honda which occurred in August. After about 7 weeks, Robles and two or three other parts employees resigned from the Teamsters and returned to work.

Finally, Robles recalled a discussion on July 14 where Boltuch made information requests of Franklin regarding the pension plan and health plan. When Franklin offered to mail the material to him, Boltuch said he needed it as soon as possible to evaluate Honda's proposals. Robles also heard Boltuch complain that Honda Parts Manager Greg Kemp hadn't returned Boltuch's phone calls in Boltuch's continuing efforts to get the necessary information prior to July 14.

Before the meeting ended, Boltuch further complained of lack of communication with Wyatt & Co., the designated administrator of the Boas pension plan. (No representative of Wyatt testified in the hearing.) Moreover, Boltuch added that the Teamsters could not accept the Boas pension plan as proposed, without certain changes to it. About 4 p.m., Franklin left the meeting, saying she didn't see any purpose in being there.

On July 19, Honda's "final" proposals were delivered to Boltuch (Resp. Exhs. P-48 [service], p-55 [parts]).

o. August 7 (Honda/Teamsters)

This session was held at the Engineers and Scientists Hall in San Francisco between 10 a.m. and 3:10 p.m. Boltuch represented the Teamsters and Franklin represented Honda. Franklin began by stating that Honda was at final position and solicited proposals from Boltuch. Boltuch denied Honda was at final position, because several sections of the last proposal had not been discussed. This led to an argument over whose fault it had been that the parties had not met for a three week period. Franklin claimed that Boltuch had refused to meet sooner; Boltuch claimed the 3-week period was part of a hiatus requested by Hulteng.

Boltuch complained in particular that Wyatt & Co. had not yet met with the Union's pension expert regarding the Boas pension plan. Accordingly, Boltuch was in no position to make a counteroffer on pension as demanded by Franklin. Instead, Boltuch went through Honda's final proposal, section by section, in some cases agreeing, for example on a 90-day probation period and on the concept of commission as opposed to hourly wages, and in other case disagreeing, for example, as in the case of the new classification of "outside salesperson" and with respect to Honda's claim of discretion to layoff unit employees in any order, or to set work hours. Where Boltuch did make counteroffers, Franklin answered by repeating, "reject, reject," on the grounds that the issues had been covered before.

According to Boltuch, Franklin continued to interrupt him, even after he told her to stifle herself, even after he stood up and pounded his fist on the table and shouted for her to stop. Accordingly, he wrote Franklin a note and read it to her across the table:

> If [Franklin] insists one more time on interrupting the [Union] or not letting the Union present an entire counteroffer, then Local 665 will assume that SF Honda is refusing to negotiate and will suspend negotiations until SF Honda stops such conduct.

[R. Exh. 11.]

A witness named John Montedaro called by Respondents confirmed this sorry spectacle. Like Robles, Montedaro was present as part of the union bargaining committee. A Honda parts employee since November 1988 and a member of the Teamsters until July, Montedaro testified that each side interrupted the other. When Franklin asked for proposals, Boltuch brought up a different subject and didn't give Franklin any respect. However, on cross-examination Montedaro recalled Franklin interrupting Boltuch with a continuing request for the Teamsters to make proposals regarding wages.

Finally, the meeting ended as Boltuch rejected Honda's final offer and a representative of the Engineers and Scientists Hall appeared to say that the Employer's group had to leave because they were trespassing and making too much noise, and that if they didn't leave, police would be called.

In the opinion of Honda General Manager Boggs who was present for part of the August 7 session, the parties were a long way away and agreement was not possible.

On August 8, Honda locked out its Teamsters bargaining unit employees. Then on August 9, Hulteng wrote to Boltuch saying that because Honda would not move from its final offer which the Union had rejected, effective August 9, Honda had implemented its final offer of July 19 except for the union security, grievance and arbitration, and the contract term (R. Exh. C-184). Franklin also wrote a letter to Boltuch on August 9 giving her version of the events of August 7 (R. Exh. C-185).

On August 9, Allen attended on behalf of the Teamsters, a meeting with Wyatt & Co. regarding the Boas' pension proposal. Besides Allen, two representatives of the Teamsters pension fund, and Seamans on behalf of Honda were present. For Wyatt, someone named DeLaCruz, who did not testify, was present. During the meeting, Seamans announced the unilateral implementation by Honda, as explained in Hulteng's August 9 letter referred to above. Notwithstanding the element of mootness, Allen testified she attempted without success to acquire information on how pension benefits were to be calculated and to acquire a summary of the plan proposal.

c. Analysis and conclusions

1. Late filed exhibits

After the record of this case was closed, I received letters dated February 25 and March 1, 1993 from Attorney Supton purporting to enclose copies of certain documents which Supton asserted supported his theory of the case: that the Machinists were not unalterably opposed to flat rate, that is flat rate as defined by Respondents in this case. Because of the practice so

clearly established by the parties to this case, I was not surprised to receive subsequent to Supton's letter, a letter from Attorney Hulteng agreeing with Supton that the documents should be received into evidence, but asserting the documents supported his theory of the case: that they flatly contradict Boltuch's testimony that certain collective-bargaining agreements between auto dealers and the Machinists contain flat-rate compensation systems. For convenience, I adopt Respondent's exhibit numbers suggested by Hulteng in his letter to me of March 15, 1993:

> R. Exh. 90, 1981-83 agreement between Burlingame Porsche-Audi, Inc. and Machinists Lodge No. 1414, District Lodge No. 190;
>
> R. Exh. 91, 1988-91 agreement between the Firestone Tire & Rubber Co. and Peninsula Auto Mechanics Lodge No. 1414, District Lodge No. 190;
>
> R. Exh. 92, 1991-91 agreement between Four-Wheel Brake Service and Machinists Lodge No. 1414, District Lodge No. 190;[33]
>
> R. Exh. 93, 1991-94 agreement between Four-Wheel Brake Service and Machinists Lodge No. 1305, District Lodge No. 190;
>
> R. Exh. 94, two-page letter dated May 2, 1986 reflecting certain terms of a contract extension between Four-Wheel Brake Service and Peninsula Auto Mechanics Lodge No. 1414.

Without objection, I reopen the record to admit the above exhibits as Respondent's exhibits and reclose the record.

2. Royal/Machinists (20–CA–23047)

a. Impasse—statement of legal principles

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. . . . Both parties must believe that they are at the end of their rope. . . . *Larsdale, Inc*., 310 NLRB 1317 (1993). A court of appeals defines impasse in a similar fashion, but with slightly different emphasis. "An impasse requires a deadlock, and for such deadlock to occur, neither party must be willing to negotiate." *NLRB v. Powell Electric Mfg*., 906 F.2d 1007, 1011–1012 (5th Cir. 1990).

To determine when an impasse occurs, the Board directs me first to the leading case of *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), where the Board stated,

> [A]fter good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

See also *KCET-TV*, 312 NLRB 15 (1993); *McAllister Bros.,* 312 NLRB 1121 (1993).

Because impasse is a defense to a charge of unilateral change, it must be proven by the party asserting that impasse exists. *North Star Steel Co*., 305 NLRB 45, 45 (1991).

A finding of impasse presupposes that the parties prior to impasse have acted in good faith. *CBC Industries*, 311 NLRB 123, 127 (1993). An employer may not parlay an impasse resulting from its own misconduct. *Wayne's Dairy*, 223 NLRB 260, 265 (1976). Among the types of unfair labor practices which, if found, may preclude impasse is an employer's refusal to supply information. *Pertec Computer Co*., 284 NLRB 810, 811 (1987). For example, in *Circuit-Wise, Inc*., 306 NLRB 766 (1992), the Board found that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with financial information it requested in connection with the Respondent's proposal for a profit-based retirement plan. The Board stated,

> We find no logical or legal basis for requiring a party to accept a proposal before being given a chance to review information that is relevant and necessary to its evaluation. [Id. at 769.]

Of course, unwarranted delay in furnishing requested material which is relevant and material, may also constitute an unfair labor practice. *South Carolina Baptist Ministries*, 310 NLRB 156, 191 (1993).

Notwithstanding the above, it must be noted as the court explained in *Intermountain Rural Electric Assn*., 984 F.2d 1562, 1569–1570 (10th Cir. 1993), that there is no presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching good-faith impasse. Rather, impasse is precluded if there is a causal connection between the employer's unremedied changes and the subsequent deadlock in negotiations. However, the court continued, the Board may consider the effect of unilateral changes on the bargaining process itself, *La Porte Transit Co. v. NLRB*, 888 F.2d 1182, 1186 (7th Cir. 1989), and likewise may consider the issue of employer good faith in light of such unilateral changes. *Cauthorne Trucking*, 691 F.2d 1023, 1026 fn. 5 (D.C. Cir 1982). Lastly, the court noted at 1570, that whether impasse occurs is a question of fact. *La Porte Transit Co*., supra at 1187. See also *Litton Microwave Cooking Products*, 300 NLRB 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991).

To conclude this initial statement of governing law, I turn to the Board's decision in *Page Litho, Inc*., 311 NLRB 881 (1993), where the Board explained the policy consideration underlying the legal principles of impasse:

> [T]he real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. See *NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 430 fn. 15 (1967).

[33] Apparently through inadvertence, this exhibit submitted by Supton was omitted from Hulteng's letter to me.

b. Impasse—conclusions[34]

In turn now to apply the law to the facts of this case. I begin with the factors recited by the Board in *Taft Broadcasting Co*., supra.[35] The bargaining history, although occasionally rancorous and bitter reflected adequate discussion of the major issues in this case: wages (flat rate), health and welfare, and pension. It was flat rate in particular which Royal indicated early on was something the employer had to have. I note the background of flat rate and the Machinists, where the Union had resisted the concept with other dealers in the Bay Area such as British Motors. Other issues in the bargaining such as grievance and arbitration, discipline and efficiency were all unresolved because the Machinists felt they could not agree to flat rate.

I have examined the posthearing exhibits submitted by Supton and find, in agreement with Respondents, these exhibits do not reflect acceptance by the Machinists of the flat-rate concept. I find further there was no evidence adduced in this hearing suggesting that the Machinists had ever agreed to the concept of flat rate, as that term was used by Respondents. Further, I note the absence from the hearing of Mike Day, the highest ranking official of the Machinists who would have had to delegate authority to Boltuch for the Machinists to agree to flat rate. Day's failure to testify convinces me that the Machinists never seriously considered agreeing to flat rate. I count seven bargaining sessions for Royal/Machinists of varying lengths of time. Even considering tardiness and premature endings for various reasons and caucuses during the seven sessions, I am nevertheless convinced adequate time was spent by the parties discussing the issues. With one exception, none of Boltuch's counteroffers embraced the concept of flat rate. The exception is Boltuch's mysterious "Union Partial Offer on Flat Rate" (GC Exh. 35), which he apparently drafted and gave to Jacobsen to be passed along to Respondents. In the Facts, I find that Respondents received this document. Nothing contained therein caused me to doubt that the parties reached impasse prior to implementation. The document failed to embrace the essence of flat rate, which is the hourly allotment of time according to standard manuals. Compare *Henry Miller Spring Mfg. Co.,* 273 NLRB 472 (1984).

Boltuch's statement of June 30 where he stated he would sign a contract with flat rate if several related issues could be resolved such as comebacks, compensation levels, and other matters was not to be taken at face value, since Boltuch did not frame a formal counteroffer and the overall content of negotiations indicates to me Boltuch was not serious in his vague oral proposal made during the sixth negotiating session.

To his credit, Boltuch apparently was responsible for calling in a Federal mediator. The presence of a Federal mediator who is unable to facilitate agreement is a factor which supports a finding of impasse. *NLRB v. Cambria Clay Products Co*., 215 F.2d 48, 55 (6th Cir. 1954).

In general, impasse on one or several issues does not suspend the obligation to bargain or remaining, unsettled issues. *Patrick & Co.,* 248 NLRB 390, 393 (1980), enfd. 644 F.2d 889 (9th Cir. 1981). However, throughout bargaining Boltuch made statements to Hulteng that he didn't desire to bargain on other issues—"Let's get down to nut-cutting," "take the other crap off the table," and similar statements indicate to me that Boltuch desired only to bargain over flat rate but that eventually it became clear to him that agreement by the Machinists wasn't possible. Thus I find that lack of agreement on this single critical issue precluded agreement generally. See *Television Artists AFTRA v. NLRB*, supra, 395 F.2d 622 fn. 13.

Beginning at page 202 of his brief (vol. I), General Counsel advances various contentions as to why Royal/Machinists had not bargained to impasse. First, General Counsel contends that Royal failed to bargain in good faith because it refused to modify its proposal on health benefits, so as to delete a reference to a "non-union" health plan in Royal's final proposal (R. Exh. P–63, p. 15, sec. 14). That section reads,

> All employees employed on July 1, 1989 shall be enrolled in the Employer's current non-union NCMCDA or Kaiser Health/Dental Plans, including flexible benefit plan provisions. New employees shall be enrolled after a three (3) month waiting period.

During the course of the negotiations, Boltuch raised this objection to Respondent's representative and it was explained that in this context, "non-union" meant only that the plan had previously been available to Royal's nonbargaining unit employees. It seems to me that it would have been better to find a different description for the NCMCDA plan. But I reject the notice that said designation constitutes bad faith. To so find would exalt form over substance. Even if the non-union designation is some evidence of bad faith, there is no nexus to the impasse in bargaining.

Similarly without merit is General Counsel's contention that Royal was represented by more than a single attorney during a single bargaining session. Boltuch too, was replaced by Allen or Siegel on occasion. In the context of this case, I reject this argument.

General Counsel also argues (br., vol. I, pp. 205–206) that the Machinists lacked sufficient time to analyze data concerning issues in the negotiations. In considering this issue, I note at p. 205, fn. 164 of General Counsel's brief, the statement that there is no allegation in the complaint in Case 20–CA–23047 that Respondents violated the Act by failing to provide information to the Union. General Counsel's failure to charge a violation initially or to seek to amend the complaint is telling indeed. I find that no information sought by Boltuch and allegedly not received in adequate time prior to declaration if impasse would have reasonably affected the parties deadlock on the major issues. General Counsel, for example, refers at brief, p. 206, to Boltuch not receiving information regarding tools. Surely, this alleged failure to provide information would not have affected impasse.

In sum, Section 8(d) of the Act specifically provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Thus the Board has held that "a party is entitled to stand firm on a position if he reasonably believes it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. However, entering negotiations with a predeter-

[34] In reaching my conclusions in this and following sections, I place little credence in the extensive correspondence prepared by both sides. I find such letters to be self-serving and to have been prepared with an eye to litigation. See *Page Litho*, supra at 882.

[35] Except for Honda/Teamsters, I find no purpose in focusing on Boltuch's occasional ill-advised profanity and his sexist and racist comments. As the Board stated in *American Packaging Corp.,* 311 NLRB 482 fn. 5 (1993): "Angry outbursts and inartful comments made in the heat of bargaining are realities of negotiations and when isolated . . . do not necessarily bespeak a sinister motive."

mined resolve not to budge from an initial position betrays an attitude inconsistent with good faith bargaining." If a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, [the Board] may properly find bad faith evinced by its "take it or leave it" approach to bargaining. *Industrial Electric Reels*, 310 NLRB 1059 (1993).

In *Larsdale, Inc*., 310 NLRB 1317, supra, the Board found that when the Respondent presented its "last best and final offer," three major issues remained unresolved, wages, health insurance, and pensions. Failure of Respondent there to make concessions to the Union did not constitute a sufficient manifestation of intent to avoid agreement. The Board found that by maintaining and adhering to its position on these subjects, the Respondent was not proven to have violated the Act. The Board went on to find impasse when the Respondent implemented its final offer because further bargaining would have been futile.

Based on the above analysis and citations of authority, I find that Royal has met its burden of proof to show impasse. Accordingly, I will recommend to the Board that this allegation be dismissed.

c. Colorado-Ute analysis

General Counsel contends that Royal's wage proposals violated the Board's holding in *Colorado-Ute Electric Assn.,* 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992), and *McClatchy Newspapers*, 299 NLRB 1045 (1990), enf. denied and remanded 964 F.2d 1153 (D.C. Cir. 1992).[36]

In *McClatchy Newspapers*, the Board stated at 1046–1047:

> [T]he [newspaper] was free to insist to impasse that the union agree to waive its statutory rights, but was not privileged to proceed with the implementation after impasse as though it had successfully secured the union's waiver. Accordingly, the Respondent had a lawful right after impasse unilaterally to consider employees for merit increases; however, as announced in *Colorado-Ute*, supra, it still had a duty to bargain with the Union about the timing and amounts of their merit increases prior to granting any such increases.

In both *McClatchy Newspapers* and the earlier case, *Colorado-Ute*, the employers sought unilateral discretion to set and grant merit wage increases, precluding the union even from grieving over any aspect of them. Thus, the union could neither discuss nor protest the increases. In analyzing the application of the two Board cases to the instant case, it is important to distinguish between good-faith bargaining and impasse on the one hand and implementation on the other hand. At least with respect to employer's discretion over merit pay, the concepts are separate. Thus in *Colorado-Ute* and *McClatchy Newspapers*, the Board held that an employer could insist to impasse on sole discretion to grant merit pay increases. The Board also noted that because the union never waived its rights to be consulted over wage issues, the employer was precluded from implementing its wage proposals under which it would have complete discretion to set amounts, and timing without union participation or union remedy in the event of dissatisfaction.

Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing, "wages, hours, and other terms and conditions of employment." Those are the mandatory subjects of bargaining—the ones over which a party must bargain if requested by the other party. But, because Section 8(d) also provides that one party need not agree to the other's proposals or make a concession, either party may lawfully bargain to impasse over a mandatory bargaining subject. *Antelope Valley Press*, 311 NLRB 459 (1993).

To ascertain whether Royal's final proposal (R. Exh. P-63) violated the Board's decision in *Colorado-Ute* and *McClatchy Newspapers*, I turn to section 13 Wages, pp. 11–15. There Royal claims the option of compensating bargaining unit technicians in either plan A (flat rate) or plan B (hourly compensation), and the option to transfer employees from one plan to another (with 1 week's notice). As to plan B, Royal claimed discretion to slot employees at one of five specified levels on Royal's assessment of experience, ability, and knowledge.

I find that Royal's wage system may be distinguished from that in *Colorado-Ute* and *McClatchy Newspapers*. First as to flat rate, the plan encompasses the use of standard manuals used in the industry. I see no unlimited employer discretion here or any control at all over time allotment for specific jobs. Both plans provide for periodic review. Moreover, an employer's insistence that it retain unilateral control over wage increases has been upheld by the Board. *Cincinnati Enquirer*, 298 NLRB 275 (1990). I find that Royal has retained no right to reduce wages under its implemented proposal. Compare *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 fn. 1 (1989).

Undoubtedly, the weakest part of Royal's arguments deal with its slotting of employees at its discretion. However, I am convinced that the discretion it reserved to itself meets the Board's test within *Cincinnati Enquirer*. I will recommend that this allegation and a similar one involving Royal/Teamsters be dismissed.

For the same reasons stated above, I will recommend dismissal of the other *Colorado-Ute* allegations contained in this case against German and Honda.

d. Other unfair labor practices alleged against Royal

In Case 20–CA–23047, General Counsel has charged Royal with committing several separate unfair labor practices. None of these allegations are alleged to constitute bad-faith bargaining nor to have otherwise constituted acts which would impede a finding of impasse. Nor does General Counsel so argue in his brief.[37]

(1) Chavez' statements to employees

According to General Counsel witness Nelson Wong, a former Royal mechanic from 1979 to 1990, Royal's then-service manager, Paul Chavez, and he were having a conversation about flat rate in the workplace in June. Chavez told Wong that he could make more money if the union wasn't there. On another occasion, Chavez told former Royal employee Michael Reuschel, who worked as a parts counterman between October 1987 to August, that those employees who were going to stay were going to be nonunion and anyone who stayed would have to be nonunion or be replaced. According to a third former Royal employee, Charles Williams, who was terminated in June, he heard Chavez tell an employee named Powell in July, that it was useless to wear a union hat because there wasn't going to be a union anymore. Chavez never testified. I find that

[36] Although the two Board decisions cited above were not enforced by the courts of appeals, I am bound to follow Board precedent unless and until reversed by the Supreme Court. See *Waco, Inc*., 277 NLRB 746 fn. 14 (1984).

[37] One searches General Counsel's brief in vain for any discussion of the independent unfair labor practices alleged against Royal.

he made the statements in question, that he was a statutory supervisor at the time, and that the statements were coercive and constituted violations of Section 8(a)(1) of the Act.[38]

(2) Direct dealing with employees

At paragraphs 8(a)–(c) of the complaint (20–CA–23047), General Counsel alleges that Royal violated the Act by dealing directly with employees. As noted above, General Counsel has not seen fit to discuss these allegations in his brief and I find no credible evidence to support them. Accordingly, I will recommend to the Board that they be dismissed.

(3) Withdrawal of recognition

At paragraph 9(d) of the complaint, General Counsel alleges that on July 11, Royal withdrew its recognition of the Machinists as the exclusive collective-bargaining representative of the Royal/Machinists unit. I begin my discussion with Hulteng's letter of July 11 to Boltuch withdrawing recognition from the Machinists based on objective evidence received by Royal that a majority of bargaining unit employees no longer desire union representation. That objective evidence, according to Hulteng, caused Royal to doubt in good faith that the Union now represented these employees (R. Exh. C-86). Hulteng reiterated Royal's position in subsequent letters to Boltuch including a letter of July 12 (R. Exh. C-88a),[39] July 13 (R. Exh. C-98), and July 18 (R. Exh. C-116). On July 12, Boltuch wrote to Hulteng asking that the withdrawal of recognition be withdrawn (R. Exh. C-90).

In *NLRB v. Oil Capital Electric Inc*., 5 F.3d 459 (10th Cir. 1993) the court citing *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 777–778 (1990), explained that a union enjoys an irrebutable presumption of majority support for 1 year after certification as the exclusive representative of an employer's workers. After the first year, the presumption becomes rebutable. The Machinists were certified as exclusive representative of Royal's bargaining unit employees over one year before the attempted withdrawal of recognition. Accordingly, as the court further stated, "an employer may rebut the presumption by showing either that the union did not, in fact enjoy material support, or that the employer had a good faith doubt, sufficiently based on objective factors, of the union's majority support."

To prevail on an "in fact" showing, the court explained, p. 461, the company must make a numerical showing that a majority of employees in fact opposed the union at the time of the refusal to bargain.

To avail itself of the good-faith doubt defense, the court continued, 461–462, the employer must produce at least some objection evidence substantiating its doubt of the union's continuing majority status. *Johns-Manville*, 906 F.2d at 1431. The employer need not have conclusive proof that the majority of employees do not support the Union, only sufficient objective evidence to support a good-faith doubt of majority status. *Bickerstaff Clay Products Co. v. NLRB,* 871 F.2d 980, 985 (11th Cir.), cert. denied 493 U.S. 924 (1989); see also *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 839 (9th Cir. 1978) (doubt must be based on "'clear, cogent and convincing,"' objective considerations; subjective evidence may be used only to bolster argument that doubt existed at relevant time (quoting *NLRB v. Tragniew, Inc.,* 470 F.2d 669, 675 (9th Cir. 1972))).

The court in *Oil Capital Electric, Inc*., concluded by stating (at 462):

> A good-faith doubt as to the union's continuing majority status can arise only in a context free of the coercive effect of unfair labor practices." *NLRB v. Powell Electric Mfg. Co*., 906 F.2d 1007, 1014 (5th Cir. 1990) (citing *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 553 fn. 6 (5th Cir. 1989)). . . .
>
> "[W]hether an employer entertain[ed] a good-faith doubt of a union's majority status is a question of fact," *Bickerstaff Clay Products*, 871 F.2d at 985, which "must be determined in the light of the totality of the circumstances in each case," *Johns-Manville*, 906 F.2d at 1431. While each factor considered alone may be insufficient for a good faith doubt of majority status, the combination of factors may be adequate. Therefore, the assessment of the cumulative effect of the combination of factors is required. *Dalewood Rehabilitation Hospital. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977).

See also *Station KKHI*, 284 NLRB 1339 (1987).

In *Sofco, Inc*., 268 NLRB 159 (1983), the Board cited an earlier case, *Celanese Corp. of America*, 95 NLRB 773 (1951), for the proposition:

> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a particular case.

In its brief, pages 254–256, Royal contends that in withdrawing recognition from the Machinists, it relied primarily on employee petitions reflecting the loss of majority, in fact. Only in the alternative, does Royal rely upon a good-faith doubt.[40] Royal has the burden of proof on this issue. To decide whether Royal has sustained its burden, I turn to the record.

Royal directs my attention to a petition (R. Exh. 60) which reads, "We, the undersigned, no longer wish to be represented by Machinists Local 1305." There follows nine apparent signatures under the "Signature" column and nine apparent dates of those signatures, all reading "7/10/89." The parties stipulated that as of the date of withdrawal of recognition, there were 15 persons in the Machinists bargaining unit at Royal Motors (R. Exh. 73). According to Royal official and Respondents' witness

[38] In finding the violations, I am not impressed with Respondents' argument, Br., p. 224, that General Counsel's failure to call employee Powell somehow impeaches Williams. I cannot speculate on Powell's absence from the case. But I find no basis to draw an adverse inference. Furthermore, each of the three former employees gave evidence against Chavez and thereby corroborated each other, especially when their testimony was not denied.

[39] Through inadvertence, this letter was not marked initially, so I have marked it with a logical subsequent number in Respondent's C-exhibits.

[40] This argument is contrary to what Hulteng wrote to Boltuch on July 11 (R. Exh. C-86). It is also contrary to what Hulteng stated at hearing:

MR. SUPTON: Is this [petition] being offered for actual loss of majority or objective good faith doubt.

MR. HULTENG: It's being offered for objective good faith doubt in the same manner as the other petitions. Its being offered for the purpose of establishing that Respondent had objective evidence upon which Respondent could reasonably rely in having a good faith doubt.

Based on Hulteng's representations, General Counsel and Charging Parties had no objection to the petitions (Tr. pp. 4507–4508).

Hansen, he found the petition laying on his desk in his office as he came to work sometime between July 10 and July 12.

Only one person testified to the circumstances surrounding his signing of the petition. A Respondents' witness named Shawn Albin, now working for German, but previously employed at Royal, testified he received the petition from someone at work, but couldn't recall who, he read the heading, signed it voluntarily, and passed it along to someone else. Neither Hansen nor Royal Manager Chavez or McCann discussed the petition with Albin.

I find that Albin signed the petition without being coerced. I also find that as a result of signature exemplars of the apparent signers (R. Exh. 83) and the testimony of Hansen authenticating the petition signers, the signatures of the petition signers have been proven to be authentic.[41]

No evidence was presented as to who prepared the petition or first began to circulate it and I am unwilling to speculate on this issue. I found above an 8(a)(1) violation of the Act with respect to Wong, an apparent signer of the petition; assuming without finding that his signing of the petition was tainted, that still leaves 8 other bargaining unit signatures in a bargaining unit of 15 employees. See *Colonial Manor Convalescent Center*, 188 NLRB 861 (1971). Hulteng's apparent change from his theory announced at hearing does not constitute a factor to weigh in Respondent's withdrawal of recognition. Based on my consideration of all the factors surrounding said withdrawal, I concluded that Royal has met its burden of proof to show an uncoerced withdrawal of recognition based on the Machinists loss of majority status in fact; or, in the alternative that Royal had a good-faith doubt of the Union's majority, based on objective consideration. See *Brown & Root U.S.A.*, 308 NLRB 1206 (1992). I shall recommend that this allegation be dismissed.

3. Royal/Teamsters (20–CA–22989, 20–CA–23292)

a. Impasse—conclusions

By comparison to Royal/Machinists, much is different in this case. First Royal did not begin to bargain with the Teamsters until May 18, and then only as to a single unit, service. It was not until June 16 that Royal finally agreed to bargain with the parts unit as well. Under the circumstances, I find that meaningful bargaining did not begin until both units were fully recognized. As noted above, Hulteng's explanation at hearing for reversing Royal's initial position of refusing to bargain with the Teamsters is not credited.

Little bargaining occurred on June 16 after Hulteng agreed to recognize and bargain with both units. Not until June 27 did full-scale bargaining get underway. However, Royal was represented at this session by Attorney Joe Ryan who had played a minor role in negotiations up to that time and was not fully informed as to the issues. Accordingly, little was accomplished.

There followed bargaining sessions on July 10 and July 24. I find that the number of bargaining sessions was simply not sufficient for the parties to reach impasse. Moreover, Royal was responsible for part of the delay, by its belated recognition of and bargaining with the Teamsters. Still further, I note that although Royal was attempting to change the hourly wages to a commission plan, flat rate was not an issue with the Teamsters. Royal also wanted to substitute a 401K plan for the Teamsters pension plan and to change the health plan. I noted that when the July 24 meeting ended, Boltuch offered to cancel his vacation to continue bargaining with Royal. However, no additional bargaining occurred.

According to Hansen, he had a conversation in late July with Teamsters business agent, Bruce Kuhn at Royal Motors. Kuhn said "if there is going to be a [new] contract, you guys are going to do some moving." Hansen responded that Royal was pretty firm in its position. Based on this conversation, Hansen concluded that no agreement was possible if Royal continued with its proposals. I reject this conclusion and find that Royal has failed to meet its burden to prove the parties were deadlocked when it implemented its final proposal. Accordingly, I find Royal violated Section 8(a)(5) and (1) of the act by implementing its final proposal, thereby making unilateral changes over the Union's objections. In support of this conclusion, I find that Royal engaged in delaying tactics, failed on at least one occasion to designate an agent, Ryan, with sufficient bargaining authority and knowledge of bargaining history, and committed other unfair labor practices found below. See *Homestead Nursing & Rehabilitation Center*, 310 NLRB 678 (1993).

b. Circulation of antiunion petition

In support of the allegation that Royal unlawfully assisted in the circulation of an antiunion petition, General Counsel presented the testimony of Walter Beamis, a member of the Teamsters and former parts department employee at Royal for 4 years until leaving in 1991. In late June, Beamis testified, his Manager Marv McCann showed him a petition and said Royal was going nonunion and it would be to his good interest to sign the petition and to get others to sign. The petition read, "we the undersigned, no longer wish to be represented by Teamsters Local 665" (GC Exh. 7). Beamis told McCann he wanted to think about it. About a week later, Beamis found the petition on his desk and McCann told him to take it home, sign it, and return it to McCann.

A second General Counsel witness named Mario Molieri also testified at hearing. Molieri worked for Royal between September 1983 through October 1991 as a parts counterman. According to Molieri, Beamis asked him to sign the petition. Apparently he did not then do so. In June, Hansen asked Molieri to come to Hansen's office where the two had a conversation. Hansen showed Molieri the petition and said, "We're trying to kick the union out." Hansen also asked for help in talking to other people about signing the petition. Specifically, Hansen mentioned the name of a hold-out named Charles Williams, a close friend of Molieri's and a supporter of the union. Hansen assured Molieri that the union wasn't needed, that Hansen could take care of Molieri, and that with all the money Hansen was spending on the union, he could take care of all employees. Ultimately on August 7, Molieri did sign a petition disavowing Teamsters representation (R. Exh. 52).

Still another former parts employee from Royal, Richard Pau, testified for General Counsel. Pau worked for Royal between November 1978 and August. During 1989, he was assistant parts manager, a bargaining unit position, reporting to McCann. Sometime between April and June, Pau talked to McCann about the petition, which Pau had seen on the desks of other employees. Pau asked if McCann had anything for Pau to sign. McCann didn't have the petition at the time, but a few days later, McCann presented the petition to Pau and asked if Pau was willing to sign the petition then. Pau declined to sign it

[41] Another signer of the petition, Nelson Wong, testified for the General Counsel as to other matters, but did not address the subject of signing the petition.

even after McCann said he must sign it if he wanted to keep his job. Later Pau and other employees consulted Teamsters Business Representative Kuhn for advice. Kuhn said if necessary to sign the petition to save jobs, go ahead and sign it and the Union would fight the petition later.

A day or two before the July 31 lockout of Teamsters (R. Exh. 3), Hansen and McCann spoke at a meeting of parts employees. Hansen asked how they felt about eliminating the union after the lockout.

I have referred to the testimony of Reuschel above and now focus again on his testimony. During the summer, Reuschel held a conversation with his Manager McCann, to ask what's going to happen. McCann told Reuschel if you want to continue to work for Royal, it's going to be nonunion, and if you don't want to continue, you are going to be replaced. These statements were reiterated by Service Manager Chavez.

On the last day before the contract expired, Reuschel signed the petition. So when McCann on the same day asked if everyone had signed the petition, Reuschel said he didn't know, but he did.

Linden Ganda was another former Royal parts employee who worked between January 1980 and July 1991. Like Pau, Ganda had been an assistant parts manager during part of his tenure. Towards the end of May, McCann presented Ganda with the petition and told him to sign it, if Ganda wished to continue working at Royal. If he didn't sign, McCann said, Royal would interpret the refusal to mean Ganda was no longer working for them. Ganda consulted Kuhn who gave the same advice as recited above.

Before he signed the petition, Ganda was called to Hansen's office by McCann. There, Hansen said that Ganda had worked for Royal a number of years and Royal had always taken care of him. Now Hansen said if he desired to continue working there, Ganda had to sign the petition and Royal needed everyone else to sign as well, "to make this thing work."

The first General Counsel witness to testify in this hearing was Frank Aguilar, also a former Royal parts employee. Employed by Royal between 1988 to 1990, Aguilar was one of a group of employees called by McCann during worktime into his office one by one in June or July. McCann told Aguilar that he had to sign the petition or he wouldn't have a job. McCann continued, that Skip [Hansen] wants everyone to sign the petition or the consequences would be serious. When Aguilar asked McCann to explain, McCann said Aguilar wouldn't have a job at Royal if he didn't sign. Aguilar signed the petition.

Finally, I note the testimony of Ernie Barnaby, a former Royal parts employee of 5 years tenure who left in January 1992. In late July, this witness was one of a group of employees called by McCann into his office again, one by one. McCann said, they're trying to get rid of the Union and Barnaby would be better off without the Union. McCann said the Company could take care of employees without the Union and employees would get raises and benefits without the Union. Then McCann asked Barnaby to sign a blank piece of paper, which the witness refused to do, saying he didn't want to get rid of the Union.

Respondents called as their witness McCann who left Royal in March 1990 after working there about 14 months. During all times material to this case, he was a statutory supervisor. According to McCann, he was first approached in early April by Molieri who said he was unhappy with the Union. About 2 days later, another employee named Uzar who did not testify, told McCann the same as Molieri. Both employees were referred by McCann to Hansen. A few days later, Hansen told McCann that if employees didn't want the Union, they would have to have a petition signed and dated to that effect by a majority of bargaining unit employees. The next day after receiving this information from Hansen, McCann called each parts employee into his office and repeated to them, one by one, what Hansen had told McCann. Then an unknown person prepared a petition which reads, "We, the undersigned, no longer wish to be represented by Teamsters Local 665."

As to Aguilar, McCann admitted talking to Aguilar in his office with the door closed [by Aguilar] due to the noise outside the office. McCann gave a petition to Aguilar and said if there were any questions, see Skip Hansen. Aguilar returned the signed petition later with the date "4/13/89" (R. Exh. 39). The blank petitions given to Aguilar and others to sign by McCann were found on McCann's desk and McCann testified that he never knew who prepared them or left them on his desk to distribute to employees. McCann denied the date and substance of the conversation as related by Aguilar.

As to Barnaby, McCann admitted having the same conversation as McCann reported for Aguilar, except McCann never received a signed petition back. McCann also denied the date and substance of conversation related by Barnaby.

As to Beamis, McCann related the same conversation as he had with the other two employees, after which, Beamis signed the petition immediately in McCann's presence. A petition apparently signed by Beamis is in evidence and dated "4/12/89" (R. Exh. 40). McCann denied the date and substance of the conversation related by Beamis.

As to Pau, McCann had the same conversation and gave a copy of the petition to him but never saw a signed copy. McCann denied the date and substance of the conversation related by Pau.

As to Ganda, McCann had the same conversation with him and Ganda took a blank petition with him, and later returned it signed and dated. There is a petition in the record apparently signed by Ganda and dated "4/26/89" (R. Exh. 41).

Finally as to Reuschel, McCann testified, he had the same conversation with him and Reuschel took a blank petition with him, and later returned his copy signed and dated. There is a petition in the record apparently signed by Reuschel and dated "4/12/89" (R. Exh. 42). McCann denied the dates and substance of the conversations related by Ganda and Reuschel.

The record also contains petitions apparently signed by Molieri dated "4/12/89" (R. Exh. 43) and by Uzar dated "4/21/89" (R. Exh. 44) and by Ramon Rocha dated "4/14/89" and by Tia Hanlon dated "4/26/89" (R. Exh. 46). Rocha and Hanlon didn't testify at hearing.

In resolving the credibility issues, I note that none of the purported petitions were shown to General Counsel's witnesses. Indeed, Hulteng represented that the signed petitions offered by Respondent through McCann . . . [are] not being offered to prove that those individuals actually signed them. They were simply being offered to prove the whole sequence of events which occurred in April" (Tr. p. 4267).

Hansen also denied making any of the coercive conversations attributed to him. He admitted that McCann transmitted the signed petitions received in April to him. Based on these petitions, Royal initially refused to recognize and bargain with both Teamsters units; then in mid-May, Royal changed position as to the service unit; after deciding the methods used by McCann to collect parts employee signatures were suspect. As

noted above, Royal decided in mid-June to recognize and bargain with the parts unit.

About August 20, according to Hansen, he came to work and found two petitions—one for parts and one for service sitting on his desk (R. Exhs. 52, 59).[42] Again Hulteng represented that he was not contending that the petitions were in fact signed by employees; rather Hulteng was arguing that Royal had a reasonable basis to rely on the petitions based on objective evidence. Thus again, none of the apparent signers, some of whom testified in this case, identified their signatures.

To recapitulate so far, Royal has made a tepid admission, br. pp. 257, 259 that misconduct by McCann regarding petitions, occurred in April, misconduct which incidentally cannot be the subject of an unfair labor practice due to the statute of limitations. Hulteng contends however, that no misconduct occurred in August when Royal withdrew recognition from the Teamsters.

Even if somehow I were to credit Royal's argument, I would still find that the refusal to bargain in May and part of June was based on admitted misconduct which while barred by Section 10(b) of the Act (limitations period), may be considered as a factor in determining whether Royal proved impasse at the time it implemented its final proposal. My decision above on that issue speaks for itself and is based in part on Royal's delay in bargaining with the Teamsters for whatever reason.

In crediting General Counsel's witnesses, Beamis, Molieri, Pau, Reuschel, Ganda, Aguilar, and Barnaby, I find that the witnesses corroborated each other. I found them believable and McCann and Hansen not believable. In making this finding, I do not for a moment assume the burden of explaining what happened here. Thus, I cannot explain the April petitions in the record. (While I fault Royal for not showing the petitions to the alleged signers, so too could General Counsel have recalled the signers on rebuttal to refute their signatures.) I simply refuse to believe that seven General Counsel witnesses could be mistaken as to the dates of key events, particularly where they relied on benchmarks such as a few days before the lockout.

I find that Royal violated Section 8(a)(1) of the Act by McCann soliciting employees to sign decertification petitions on or about the dates testified to by the witnesses. An employer's participation in such a petition violates Section 8(a)(1) of the Act, because it tends to be coercive or tends to interfere with the employees' exercise of their rights. McCann and Hansen instigated and encouraged the petitions and coerced employees into signing them. Moreover, with a great emphasis on efficiency in the workplace, Hansen allowed McCann to operate, unhampered by his other duties, on worktime in his meetings with employees. See *Hancock Fabrics*, 294 NLRB 189, 191 (1989); *Caterair International*, 309 NLRB 869, 879 (1993); *Central Washington Hospital*, 279 NLRB 60, 64–65 (1986); *NLRB v. Triumph Curing Center*, 571 F.2d 462, 470 (9th Cir. 1978).

c. Offer of bonus to sign petition

General Counsel called a witness named Charles Williams, a former Royal employee in the service unit. Williams was terminated in March 1990 after 12 years employment by Royal. His termination will be further considered below, but for now I credit his unrebutted testimony that Service Manager Chavez asked Williams to sign a petition to get rid of the Union; that Chavez offered Williams a bonus to get the rest of the guys to sign the petition; and that Chavez told another employee, who was wearing a hat with union insignia, there's not going to be a union here, so you're just wearing that hat for nothing.

Where a witness gives testimony as to what was said by his supervisor and the supervisor . . . does not deny having made the statement, it stands on the record as undisputed fact. *Lock Insulators*, 218 NLRB 653, 656 (1975). I find that Royal violated Section 8(a)(1) of the Act by Chavez making the statements in question to Williams.[43] See *Dentech Corp*., 294 NLRB 924, 937 (1989); *Weather Shield Mfg*., 292 NLRB 1, 2 (1988), revd. on other grounds 890 F.2d 52 (7th Cir. 1989).

d. Withdrawal of recognition

In light of my discussion above, I find that Royal violated Section 8(a)(5) and (1) of the Act in late August by withdrawing recognition of the Teamsters service and parts units. Because the alleged good-faith doubt regarding the units was not raised in a context free of unfair labor practices, I find that Royal has failed to meet its burden as to the Teamsters. Moreover, the two petitions which are in the record (GC Exhs. 52, 59) do not meet the Board's requirement of clear and cogent evidence supporting rejection of the union as bargaining agents, because of the testimony of the several General Counsel witnesses referred to above. See *Laidlaw Waste Systems*, 307 NLRB 1211, 1214–1215 (1992).

e. Unilateral change in disciplinary policy[44]

I conclude the segment on Royal/Teamsters by returning to Williams and an issue raised by General Counsel over his termination. As noted above, Williams was terminated by Hansen in March 1990. On February 19, 1990, Williams received a written warning for doing poor work and for not being in the place he was assigned to be (R. Exh. 6). On February 26, 1990, Williams was given a second warning to improve his work performance or be terminated (R. Exh. 62). On March 1, 1990, Williams was terminated for damaging a car due to poor job performance (R. Exh. 63). Williams had been terminated two other times in past years, but these terminations had been reversed, after union grievances had gone to a board of adjustment.

Under Royal's past practice, employees were not terminated unless they had two written warnings in the year prior to discharge. Williams testified that he received none, but I find that he received two, the two issued by Royal and contained in the record. I also find that Williams was aware of these warnings, because there is no evidence to show Royal would issue warnings to Williams without Williams' knowledge. General Counsel forthrightly states the issue, brief, p. 45, "If the trier of fact credits Williams' testimony that he did not receive the required two warnings prior to this discharge in 1990, then it follows that the discharge. . . [violated the Act]. I do not credit Williams' testimony in this respect and I will therefore recommend that this allegation be dismissed.

[42] The petitions were apparently signed by a majority of bargaining unit employees (R. Exhs. 68, 69).

[43] Although Williams could not be certain when Chavez made the statements in question, I look to the testimony of other General Counsel witnesses within the Royal/Teamsters case to find that the statements were made in the spring or summer.

[44] At p. 45 of her brief, vol. II, General Counsel has withdrawn par. 9(c) of the complaint on grounds of lack of evidence.

4. German/Machinists (20–CA–23045)

a. Impasse—conclusions

All agree that as of July 5, German implemented its final offer except for section 2 (Union Security); section 10 (Grievance Procedure); section 10.1 and 10.2 (Productivity and Quality); provisions of section 13 dealing with dispatchers; provisions of Section 14 dealing with the flexible benefit plan and section 24 (Contract Expiration) (R. Exhs. C-71, C-88). Thus the issue is whether German met its burden of proving that impasse existed at the time of implementation.

I note that the parties first met to negotiate over a new contract on May 16. I also note that as was true for Royal/Machinists, German was seeking flat rate in its proposals among other changes to the old contract. It is not necessary to recapitulate the various bargaining sessions. I find that the parties had adequate time to discuss the issues, but nevertheless failed to reach agreement. The counterproposals made by Boltuch never dealt with flat rate. For example, Boltuch's option 1 and option 2 on May 25 did not convey to German that the Machinists were willing to bargain over the most important issues such as flat rate and pension plans. Moreover, any concessions that Boltuch did make were contingent upon German giving up an element that they wanted in the new contract. On June 14, Day was present at the bargaining session and stated his opinion that German was not really interested in flat rate, but was trying to provoke a labor dispute to bust the union. Boltuch's statement on June 30 that the Machinists were now ready to bargain over flat rate is not to be taken at face value. It is contradicted by surrounding facts and circumstances including statements attributed to Mike Day.

Based on my review of the bargaining sessions and for essentially the same reasons as indicated for Royal/Machinists, I find the parties were at impasse and that German was privileged to implement its last and final offer. Accordingly, I will recommend this allegation be dismissed.[45]

b. Failure to provide information

German is not charged directly with bad-faith bargaining. In fact, on the very first day of hearing, General Counsel stated, "There are no allegations that any party engaged in bad faith bargaining" (Tr. p. 30). Nevertheless, as noted above, a failure to supply information relevant and necessary for bargaining constitutes a failure to bargain in good faith and precludes a finding of impasse. *Pertec Computer Co*., 288 NLRB 810, supra; *Cowin & Co*., 277 NLRB 802, 817 (1985).

More generally, the Board has held in *Coca-Cola Bottling Co. of Chicago*, 311 NLRB 424, 425 (1993):

> The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it. *White-Westinghouse Corp.,* 259 NLRB 220 fn. 1 (1981). In making this determination, the Board has repeatedly reiterated the following principles enunciated by the Third Circuit in *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965):
>
> > [W]age and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-employee relationship, a union is not required to show the precise relevance of it, *unless effective employer rebuttal comes forth; as to other requested data*, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, *demonstrate more precisely the relevance of the data it desires*. [Emphasis added.]
>
> Thus, if the requested information goes to the core of the employer-employee relationship, and the employer refuses to provide that requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why it cannot, in good faith, supply the information. If the information requested is shown to be irrelevant to any legitimate union collective-bargaining need, however, a refusal to furnish it is not an unfair labor practice. *Emeryville Research Center v. NLRB*, 441 F.2d 880 (9th Cir. 1971).

In his brief, volume I, p. 144, General Counsel complains that on June 30, the sixth bargaining session, Boltuch requested certain payroll records for mechanics, body men and service writers, records on comebacks, records showing work performed by each unit employee, and information on the productivity of employees in the Machinists bargaining unit. At page 145 of the brief, General Counsel concedes that German did not refuse to provide the information requested by the Union (payroll records). Instead, Hulteng sent a letter dated June 20 to Boltuch offering to allow the Union to examine the requested payroll records at the dealership (R. Exh. I-11). Then on or about June 30, German allowed the Union to pick up the requested records at the dealership and examine them at the Union's office (G.C. Br., p. 145).

In fact, as noted above, German permitted Shmatovich and other union representatives to go to German and physically remove several file drawers of records containing all or most of the information requested by Boltuch earlier on June 30 and before. As these files were being removed from the premises to German's rental truck, Schmatovich had a conversation with Peter Burkhardt, German service manager and Respondents' witness. At the time of the conversation, Burkhardt was a service advisor and part of the Machinists bargaining unit. Although Shmatovich denied the conversation, I credit Burkhardt's account that Shmatovich said, when he was finished examining the files, he would rearrange them so they wouldn't be much use to German. In fact, when the files were returned, many file drawers were out of order. Other drawers had apparently never been examined at all.

Throughout the bargaining, Hulteng had assigned a lawyer named Justin Seamons to prepare answers to information requests. Although Seamons had left the firm by the time of hearing and did not testify, his answers to the information requests were received into evidence (R. Exhs. I-1–I-50).

A union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under Section 8(a)(5) turns upon the circumstances of the particular case. *Coca-Cola Bottling Co. of Chicago*, supra, citing

[45] Although I will find below that German committed certain unfair labor practices, I do not find the necessary causal connection between these unfair labor practices and the deadlock in bargaining so as to preclude impasse.

Detroit Edison Co. v. NLRB, 440 U.S. 301, 314–315 (1979). See also *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981).

Here, I find that the information requested by the Union on June 30 or before was turned over to the Union in a good faith effort by German (see R. Exh. I-50, pp. 18–19 report for June 30). Alternatively, the information in question, to the extent it existed, was contained in the German files turned over to Shmatovich on or about June 30. I find that under the circumstances presented in this case, German met its obligation to the Union by turning over the files. *Detroit Edison Co. v. NLRB*, supra at 314–315; *E. I. du Pont & Co*., 291 NLRB 759 fn. 1 (1988). As to General Counsel's claim, brief, page 146, that insufficient time was allotted for examination of the files, I reject this contention, because German offered to allow the Union additional time to examine the records on the premises of German (R. Exh. I-21, pp. 2-3). Moreover, there is no evidence in the record to support any claim that the Machinists could have accomplished more by keeping the records at the union offices for a longer time or that their bargaining position could have changed. Based on all the facts and circumstances, I will recommend that this allegation be dismissed.[46]

c. Schmitt statements to Torres

General Counsel witness Francisco Torres testified that he worked at German between 1982 and September when he quit. Since 1987, Torres had worked as a mechanic. In his testimony, Torres related several alleged conversations between himself and Schmitt. Of these General Counsel contends, brief, vol. I, pp. 146–147, that two violated the Act. One of these allegedly occurred in late June when Schmitt said employees would be better off without "the third man," i.e., the Union. At about the same time, also in a conversation in the workplace, Schmitt told Torres if he didn't like to work there he could find a job elsewhere. In July Schmitt told Torres that German would be operated on a nonunion basis.

Schmitt admitted to conversations in the work place with Torres, but denied the substance of the conversations related by Torres. In support of Schmitt, Respondents called a current employee named Subhash Chandra Nykan, who witnessed many of the conversations between Schmitt and Torres. Nykan has worked for German about 14 years as an auto technician and is a member of the Machinists bargaining unit. Nykan denied hearing Schmitt make any reference to a third man or to getting rid of the Union. Torres, on the other hand, was corroborated by Obo Help, another former German mechanic employed there between October 1988 and July 1990. In late June, Help had a conversation with Schmitt, during which negotiations were discussed. During this conversation, Help said he was not happy that there was no union contract in effect. To this Schmitt said if Help were not happy at German, he could get a union job. In considering the evidence in question, I credit the testimony of Torres and Help and find that German violated Section 8(a)(1) of the Act by Schmitt making coercive statements to employees. See *Tualatin Electric*, 312 NLRB 129 (1993).

Help also related other statements of Schmitt who asked Help what he thought of German proposals. Help said he wanted the contract to be signed and didn't like the German proposals. Schmitt added that he intended to get rid of the Union pension plan and substitute a 401K plan where employees could use their own money. As to flat rate, Schmitt represented that Help could make more money under that system. Although Schmitt denied making the statements in question, I credit Help's testimony finding that Schmitt was engaged in a pattern of behavior to determine employee sentiment and to make coercive statements. See *Harris-Teeter Super Markets*, 310 NLRB 216 (1993).

d. Direct dealing with employees

At page 147 of his brief, volume I, General Counsel makes a brief argument regarding a unilateral change by German allowing free parking for employees. Here are the facts. According to Help, prior to the lockout, he and other employees were required to park their cars on the street as they were not permitted to park in German's facility due to lack of space. Besides the inconvenience of finding a spot, frequent parking tickets resulted. After the lockout, employees were allowed to park upstairs in German's facility and when that became too crowded, German began to pay for indoor parking for employees at a nearby Holiday Inn.

Help's account was supported by the testimony of Kenneth Kirk, a current German employee and assistant parts manager. Kirk also identified a notice in the handwriting of Schmitt appended to a German bulletin board in late June or early July. In pertinent part, the notice reads,

> Parking will be available free to all employees as of July 1 (day or night schedule). [GC Exh. 40.]

The subject of employee parking had not been the subject of negotiations between German and the Machinists.

According to Schmitt's testimony, indoor employee parking was dependent on whether business was busy or slow. Usually the slower period was between May through November when employees would be permitted to park inside (Tr. pp. 4923–4924). Schmitt also testified that in March, German began to pay for employee parking in a building across the street. Prior to that, beginning in the fall of 1988, German paid for employee parking at the Holiday Inn (Tr. pp. 4926–4927). During this change in parking practice, German never bargained with the Union and no grievance was ever filed (Tr. p. 4927).

On cross-examination by Supton on this issue, the scenario changed. Thus during the first and second quarter of 1989, German provided free parking for employees—upstairs in the facility (Tr. p. 5142). Thus, was done even though by 1989, there was no slow season or busy season; instead "it was pretty much busy all year around then" (Tr. p. 5143). Particularly the summer of 1989 was busy and yet the employees were given free parking then; "A lot of people drove motorcycles, there was a night shift. They all parked indoors" (Tr. p. 5143).

Schmitt's testimony on this point is contradictory, self-impeaching, irrelevant, contrary to common sense and I reject it in toto. I don't believe any of it. I also credit the testimony of both Help and Kirk, finding it very credible and supported by Schmitt's handwritten notice.[47] I find that German made a uni-

[46] Under the circumstances, I need not decide whether the Union's information requests were unduly burdensome. See *Andy Johnson Co*., 230 NLRB 308, 309 (1977), or whether, more generally, it was the Union's own acts which foreclosed effective negotiations regarding information requests. See *Double S Mining*, 309 NLRB 1058 (1992).

[47] Moreover, I find as a current employee, Kirk was entitled to enhanced credibility as his testimony is contrary to his own financial interests. *Pittsburgh Press Co*., 252 NLRB 500, 504 (1980).

lateral change in terms and conditions of employment by changing its policy regarding employee parking. Since German had never bargained regarding employee parking, its implemented offer did not cover employee parking which was a change not reasonably comprehended within the earlier offers to the Union. See *Plainville Ready Mix Concrete Co*., 309 NLRB 581, 584–586 (1992). I further find that the Union never waived its right to bargain over the unilateral change by whatever may have happened in the past, because there is no clear and convincing evidence, or any evidence at all, of German giving notice to the Machinists of its policy on employee parking, a mandatory subject of bargaining. *S & I Transportation*, 311 NLRB 1388 fn. 1 (1993).[48]

In the alternative, I find that German unlawfully dealt directly with its employees. As explained in *Allied Signal, Inc.*, 307 NLRB 752, 753–754 (1992),

> It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees . . . regarding terms and conditions of employment violates Section 8(a)(5) and (1) of the Act. . . . Direct dealing need not take the form of actual bargaining. . . . Going behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions . . . plainly erodes the position of the designated representative.

An employer violates the above proscriptions of the Act by "solicitation of grievances" and "direct dealing with employees over working conditions." See *Thill, Inc*., 298 NLRB 669, 671 (1990).

By whatever terms the violation is characterized, there can be no question that German violated Section 8(a)(5) of the Act and I so find.

e. Withdrawal of recognition

On December 8, Hulteng wrote to Boltuch giving notice that German was withdrawing recognition from the Machinists, based on objective evidence that a majority of employees in the Machinists unit no longer wish to be represented by that Union, which objective evidence causes German to doubt in good faith that the Union any longer represents its employees (R. Exh. C-263). The objective evidence referred to in the letter consisted of two separate petitions, each of which contained the heading, "We, the undersigned employees of German Motors do not wish to be represented by a union;" the heading was followed by the apparent signatures of a majority of employees in the bargaining unit (R. Exhs. 71, 72). As has been true of the other petitions, Schmitt testified he did not know who prepared the petitions nor who placed them on his desk. Respondents offered a number of signature exemplars of the employees who apparently signed the petition (R. Exh. 87). A list of bargaining unit employees as of December 12 was received into evidence without objection (R. Exh. 81). This shows a majority of bargaining unit employees apparently signed the petition.

It is unnecessary to consider the testimony of the two petition signers Steven Mills and Jeurgen Rosanski, called by Respondents. General Counsel makes a single argument in his brief, volume I, pp. 201–202, that an employer cannot withdraw recognition from the union in the context of prior, unremedied unfair labor practices. Although General Counsel has not directly challenged the circulation of the petitions in this segment of the case, I nevertheless find that the withdrawal of recognition was unlawful in light of my findings above that German committed certain unfair labor practices. I find that German violated Section 8(a)(5) and (1) of the Act by attempting to withdraw recognition from the Machinists.

f. Lockout of employees

At General Counsel's Exhibit 2jj, second amendment to complaint, Case 20–CA–23045, General Counsel alleges that the German lockout of the Machinists bargaining unit was unlawful. Neither side has briefed this issue (General Counsel has limited its argument on lockout to a short discussion of Honda/Machinists lockout (Br., vol. I, p. 226)). Respondents mistakenly assert (Br., p. 190, fn. 51) that an "anomalous pleading" occurred, because General Counsel did not allege that German's lockout of the Machinists violated the Act, while General Counsel did allege that the Honda/Machinists lockout violated the Act. This confusion is understandable in light of the breadth of the General Counsel's case.

A lockout traditionally is used to bring economic pressure to bear in support of the employer's bargaining position. *Challenge-Cook Bros*., 282 NLRB 21 (1986), enfd. 843 F.2d 230 (6th Cir. 1988). The lockout has been upheld by the U.S. Supreme Court. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). One court has upheld the lockout even before impasse, if justified by legitimate and substantial business interests and where its impact on employees was comparatively slight and there was no showing of antiunion motive. *Lane v. NLRB*, 418 F.2d 1208, 1212 (D.C. Cir. 1969). In this case, I have found above that German/Machinists were at impasse prior to lockout so it is unnecessary to determine whether a pre-impasse lockout in this case would be proper. See *Harter Equipment*, 280 NLRB 597 fn. 6 (1986), enfd. 829 F.2d 458 (3d Cir. 1987). I find that without regard to any reference to the old collective-bargaining agreement, German was permitted to lockout employees, since I find no antiunion motive.

In the alternative, I also note the reference in Respondents' brief, page 191, to a paragraph from each of the collective-bargaining agreements in issue in this case. In pertinent part, the paragraph reads,

> If negotiations extend beyond . . . the expiration of the Agreement, no change shall be made in any terms or conditions of employment unless expressly agreed to by the parties, or until negotiations are terminated by economic action of either party after first given forty-eight hours written notice.

I find nothing unlawful about this paragraph which was mutually agreed to by both sides. I also find no bad-faith use of the above paragraph to justify a 1-day lockout. Accordingly, I will recommend dismissal of this allegation.

5. German/Teamsters (20–CA–23048)

a. Impasse—conclusions

Unlike Royal/Teamsters, there was no delay here in bargaining based on German's withdrawal of recognition, and claim of good-faith doubt of the union's majority status. I count seven bargaining sessions of varying lengths of time. As noted above,

[48] Even if somehow, appropriate notice is found, simply because a collective-bargaining representative may have had no quarrel with an employer's past practice in its employee parking policies, that does not in and of itself constitute a waiver of the Union's right to bargain over the matter. See *Page Avject Corp.,* 275 NLRB 773, 778 (1985).

flat rate was not an issue. However, German desired an incentive based pay plan, a new pension plan and new health and welfare plans and other changes in a new collective-bargaining agreement.

As already noted, there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith. *J. W. Rex Co.,* 308 NLRB 473, 496 (1992).

I will find below some evidence of German bargaining in bad faith at the table and other evidence away from the table reflecting bad faith. On June 26, German sought agreement to terminate up to 25 percent of the bargaining unit work force in a 30-day period without just cause.[49] Under this proposal, German would have been able to terminate all unit employees within a 4-month period. On July 19, German sought agreement to issue work rules unilaterally. At the same meeting, the Teamsters raised questions about German's desire to pay two service department employees on a flat rate option, although flat rate had not been an issue with the Teamsters up to that time. Thus in this case, it is helpful to examine the proposals not to determine their extrinsic worth but instead to determine whether in combination and by the manner proposed, they evidence an intent not to reach agreement. See *Hydrotherm*, 302 NLRB 990, 993 (1991). In the final analysis, however, it is German's conduct away from the table which convinces me that no impasse occurred.

b. Schmitt's statements to employees

According to Christopher Martin, a General Counsel witness and current employee in the parts department for 6-1/2 years, he went to an employee meeting on July 17 at German. Lasting about 30–45 minutes of worktime, the meeting featured representatives of Gene Adams & Assocs., the administrator of the plan, who explained the advantages of the 401K plan.[50] After the meeting was over, Schmitt approached Martin and asked him if he had tried to sign up for the 401K plan. Martin answered that yes, he was interested in it. Then Schmitt replied, that Martin couldn't sign up for it, because Martin was still in the Union and the Union was against it. When Martin asked how he could sign up for the plan, Schmitt said he had to resign from the Union.

I credit this account of Martin because he is a current employee, because he is otherwise a credible witness, and because Schmitt is not. I find that Schmitt's statement was coercive and violated Section 8(a)(1) of the Act. *Fabric Warehouse*, 294 NLRB 189, 190–191 (1989).

Another witness called by General Counsel was Kenneth Kirk, assistant parts manager and current employee. According to Kirk, he returned to work on August 5, the day after the lockout and talked to his superior, Mark Binkin, parts manager and Respondent witness. Kirk inquired about his future at German in light of his union activities on the union negotiating committee and elsewhere. Binkin assured Kirk that there would be no repercussions. A short time later on the same day, Schmitt called Kirk into his office and reiterated what Binkin had said, Then Schmitt added this is a time for no unions and no hard feelings.

I find Kirk to be a credible witness as a current employee. Accordingly, I find that Schmitt made the statement and that it violated Section 8(a)(1) of the Act.

c. Direct dealing with employees

According to Respondents' witness, Mark Binkin, German parts manager since November 1988, and a statutory supervisor, he had been assisting Schmitt by drafting an incentive pay plan based upon Binkin's experience at another dealership. As Binkin was working on German's proposals during work time, he conferred with Kirk, a member of the bargaining unit and asked his opinion about a $700/$800 base and some percentage above that for incentive. Binkin conferred with Kirk about German proposals on at least two other occasions and all of this occurred in June or July.[51]\51\N

An employer who bargains directly with employees violates Section 8(a)(5) which requires that an employer bargain collectively with the designated representative of its employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). The vice that Medo sought to avoid was undermining the authority of the union's bargaining representatives through direct dealings with bargaining unit employees. Such tactics are inherently divisive and make negotiations difficult and uncertain. *NLRB v. General Electric Co.,* 418 F.2d 735, 755 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970). Direct dealing need not constitute direct bargaining but can consist of getting employee input behind the Union's back in preparation for forthcoming negotiations. *Detroit Edison Co*., 310 NLRB 564, 576 (1993). By conferring with Kirk on the content of proposals, Binkin would recommend to Schmitt for presentation to Boltuch, German violated Section 8(a)(5) and (1) of the Act.

Kirk also testified that in June, Binkin told parts department employees they would be paid at the highest rate proposed. I agree with General Counsel, brief, volume II, page 77, that while Binkin was giving this information directly to employees, German was claiming at the bargaining table, unfettered discretion to slot employees, based on German's assessment of their skills and experience.

Respondents contend, brief, page 253, that Binkin was merely informing employees about German's proposals. In *Beaumont Glass Co*., 310 NLRB 710 (1993), the Board affirmed the decision of the administrative law judge wherein a direct dealing violation was found. The administrative law judge wrote at 718,

> [I]n Proctor & Gamble Mfg. Co., 160 NLRB at 340, the Board held that Section 8(a)(5) of the Act does not per se preclude an employer from informing its employees in noncoercive terms . . . of proposals made to the Union." This does not mean however, that direct communications with employees is beyond the proscriptive ambit of the Act when utilized in furtherance of objectives inimical to the principles of good-faith collective bargaining.

Based on this authority and the credited testimony, I find that Binkin's statements tended to undercut the Union and again

[49] This provision was contained within German's final proposal (R. Exhs. P-16, p. 9, P-23, p. 9).

[50] German's 401K plan had been implemented on July 5 as part of German's final offer to the Machinists.

[51] German defends this allegation by claiming it is outside the 10(b) limitations period (Br. p. 252). Assuming without finding that Respondents have properly raised the statute of limitations affirmative defense in their answer, GC Exh. 2(f) (fifth affirmative defense), I credit Kirk's testimony that Binkin conferred with him in June or July. I cannot explain why Binkin was conferring with Kirk, at the times indicated when the incentive plan was completed by June 6.

violated Section 8(a)(5) of the Act. See also *Beaumont Glass Co.,* supra at 719.

On July 19, Kirk and Teamsters official Kuhn were attending a bargaining session when they learned of a meeting occurring at German with parts department employees and two of the drivers. They left immediately for German and upon arrival, Kuhn asked Schmitt to stop enrolling employees in a benefit plan while negotiations were underway. About 1 week later, Kuhn wrote a letter to Schmitt protesting the meeting which, according to Kuhn, was for the purpose of enrolling employees into the employer's proposed profit-sharing program (GC Exh. 36).

Both Kirk and Martin had attended a meeting on July 17 at German which was similar or identical to the meeting of July 19. The earlier meeting lasted about an hour and was held on worktime. About 15 to 20 employees were present and heard presentations by two women representing Gene Adams & Associates. Some material describing the plan was distributed (GC Exh. 41). Employees were told by the representatives of Gene Adams & Associates that they had to make a decision before they left the meeting (Tr. p. 1351). I credit the testimony of current employee Kirk describing what happened at the meeting. I also find that both meetings constituted direct dealing in violation of Section 8(a)(5) of the Act.

At page 249 of their brief, Respondents argue that any harm that may have been done was remedied when the Employer acceded to the Union's demands and halted the meetings. However, the Board has held that cessation of activities violative of the Act does not constitute a defense. *NLRB v. PIE Nationwide*, 894 F.2d 887, 890 (7th Cir. 1990). I find Respondents' defense is ineffective and void.

d. Failure to provide information

General Counsel contends that German failed to provide certain information to the Teamsters (Br., vol. II, pgs. 79-80). All or most of the information in question was requested by Allen on June 26, about a month and one-half after negotiations began. More specifically, General Counsel refers to information on laundry costs, names of persons who served on jury duty, and costs of proposed fringe benefit plans. In a letter to Boltuch, dated June 27, Franklin wrote as follows:

> Burton F. Boltuch, Esq.
> Boltuch & Siegel
> I1330 Broadway
> Suite 1326
> Oakland, CA 94612
>
> Dear Mr. Boltuch:
>
> I have prepared the following letter to respond to your Information Requests to German Motors on June 26, 1989.
>
> 1. For the past three years, state the amount of vacation pay that each terminated employee has received.
>
> Response: The Employer has paid each employee for his unused accrued vacation upon termination. The Employer maintains no particular record of the terminated employees or the amount paid; however, such information is contained in, and may be extracted from, the Employer's payroll records. These records are available at the dealership for you to review by appointment through Henry Schmitt.
>
> 2. For the past five years, state the name of each employee who has served on jury duty.
>
> Response: The Employer maintains no particular record of the employees who have served on jury duty; however, this information is contained in, and may be extracted from, the Employer's payroll records. These records are available at the dealership for you to review by appointment through Henry Schmitt.
>
> 3. State the name of each employee who has taken funeral leave, the duration of the leave, and the pay, if any, which the employee received.
>
> Response: The Employer maintains no particular record of the employees who have taken funeral leave, the duration of the leave, or the pay, if any, which the employees received; however, this information is contained in and may be extracted from, the Employer's payroll records. These records are available at the dealership for you to review by appointment through Henry Schmitt.
>
> 4. For the past five years, state the name of each employee who took personal leave in excess of thirty days and the number of days actually taken.
>
> Response: The Employer maintains no particular record of the employees who have taken personal leave in excess of thirty days or the number of days actually taken; however, this information is contained in, and may be extracted from, the Employer's payroll records. These records are available at the dealership for you to review by appointment through Henry Schmitt.
>
> It is my understanding that the foregoing responses cover all of your information requests to German Motors through June 26, 1989. Unless I hear otherwise from you by June 29, 1989, I will assume that these responses are complete and satisfactory.
>
> Very truly yours,
> /s/ Elizabeth Franklin
> Elizabeth A. Franklin

[R. Exh. I-17.]

On July 5 and 13, Hulteng sent additional letters to Boltuch in which additional information was provided regarding German's 401K profit-sharing plans and the new administrator of the flexible benefit plans was named (R. Exhs. I-21, 29).

Based on my review of German's responses to the information requests, I find that timely compliance has been made and I will recommend dismissal of this allegation.

e. Withdrawal of recognition

Once again, the pattern by now well established repeated itself. In December, Schmitt found a petition on his desk when he came to work one day. On the petition, were the apparent signatures of a majority of Teamsters bargaining unit employees all agreeing with the typed heading, "We the undersigned employees of German Motors do not wish to be represented by a union" (R. Exh. 72). A list of Teamsters bargaining unit employees as of December 12, was entered into evidence without objection (R. Exh. 82). In addition, handwriting exemplars for the apparent signers were also received into evidence (R. Exh. 83). Based on the petition, Hulteng sent a letter to Boltuch, dated December 8, withdrawing recognition from both the German parts and service units (R. Exh. 268A).

Considering the petition, and the context of unfair labor practices found in German/Teamsters, I agree with General Counsel, brief, volume II, page 86, that German was legally prohibited from withdrawing recognition. In *Detroit Edison*

Co., supra, the Board found that the employer was not privileged to rely on an employee decertification-type petition, as a basis for withdrawing recognition from the Union "[a] withdrawal of recognition must occur in a context free of unfair labor practices." The Board went on to explain that Respondent's 8(a)(5) and (1) misconduct conveys to employees the notion that they would benefit more, or receive greater consideration, without union representation. Such conduct, the Board concluded, affects the bargaining relationship and precludes the Respondent from withdrawing recognition on the basis of a claimed good-faith doubt. In light of the above, I find that German violated Section 8(a)(5) of the Act by attempting to withdraw recognition from the Teamsters when it was not legally permitted to do so.

6. German/Painters (20–CA–23064)

a. Impasse—conclusions

At pages 180–181 of his brief, volume I, General Counsel contends that German bargained in bad faith, because it implemented over Rosenfeld's objection, a health plan which it designated as "non-union." I have dealt with this argument above and have refused to find bad-faith bargaining for the reasons urged by General Counsel. I now do so again, finding that "non-union" in the context in question refers only to a health plan formerly available to German's nonbargaining unit employees. I find no bad-faith bargaining by German implementing its "non-union" health plan. See *Coastal Electric Cooperative*, 311 NLRB 1126 (1993).

Turning next to the *Taft Broadcasting* factors, I count six bargaining sessions between the parties, although admittedly, the sessions were of differing lengths of time and varying degrees of productivity. In analyzing these sessions, I begin with the confusion over the Painters negotiators. First Boltuch represented the Painters, then Van Zevern, then as of June 29 the final negotiating session, Rosenfeld. These changes in negotiators were not the responsibility of German. The entry of Rosenfeld at the 11th hour contributed to the failure of German/Painters to reach agreement. See *Louisiana Dock Co*., 293 NLRB 233, 235 (1989), reversed in part 909 F.2d 281 (7th Cir. 1990); *AAA Motor Lines*, 215 NLRB 793, 794 (1974).

To be sure, on June 29, Rosenfeld denied the parties were at impasse and also stated that the Painters had no philosophical opposition to flat rate. Rosenfeld did not then offer or even define the appropriate flat rate proposal which the Painters would find acceptable. The Painters' July 5 flat rate offer recited in the facts, if not a sham, as Respondents claim (brief, p. 110), was a far cry indeed from what German had been seeking. I do not credit Rosenfeld's expressions of flexibility because the Painters never presented concrete evidence that they were willing to embrace German's proposals, particularly as to flat rate. Further evidence of delay on June 20 and obfuscation by the Painters is shown by Van Zevern saying on the one hand that flat rate was not acceptable to German employees; then on June 29, by Rosenfeld stating that no flat rate proposal had been made by the Painters on that day, because Van Zevern had not had an opportunity to tell German employees it was coming. On cross-examination of Rosenfeld on this point, the following exchange occurred:

> Q. And to your knowledge did the Union talk to the members about flat rate between the June 29, 1989 meeting and July 5, 1989?
>
> . . . .
>
> a. My answer is no.

[Tr. p. 1595.]

Finally, I note that after Hulteng told Rosenfeld at the conclusion of the June 29 meeting that German was planning to implement on July 5, Hulteng offered to meet with Rosenfeld for further negotiations on July 1, 2nd, 3rd or 4th. To this, Rosenfeld said, "the parties, to my knowledge, had not met on the weekends before and I saw no reason to meet any of these weekends around the holiday. . . . I told [Hulteng] that I was available on the 6th late in the day" (Tr. p. 1570). Rosenfeld gave a variety of reasons for not meeting with Hulteng between June 29 and July 6th: June 30 (busy in Stockton), July 1 (taking daughter to ballet), July 2 (busy), July 3 (busy with arbitration and negotiations) and July 4 (holiday) (Tr. p. 3397).

In light of the above, I find that German has met its burden of showing impasse. In the alternative, I find that the Union precluded effective negotiations by its dilatory tactics and nonserious bargaining. In any event, I will recommend that this allegation be dismissed because German was privileged to implement its final offer.

7. Honda/Machinists (20–CA–23046)

a. Impasse—conclusions

I agree with Respondents (Br., p. 81), that relevant and material facts begin on June 27 with the agreement to extend the Honda collective bargaining agreement due to Boggs having been newly hired and due to Boas assuming a more active role in negotiations. A hiatus in negotiations between June 21 and July 10 then followed. When the parties reassembled on July 10, there was confusion over Honda's failure to have new proposals reflecting major changes in position. However, this was remedied on July 20 when Honda issued its third final proposal, wherein flat rate was taken off the table and wherein certain other changes were made as reflected in the Facts above.

Though Honda took flat rate off the table, agreement was never reached. I count nine bargaining sessions, three of which occurred after flat rate was off the table. These three sessions allowed for adequate discussion of remaining issues such as MFN policy, a commission plan for dispatchers, and the Boas pension plan. However, for a variety of reasons, I cannot find the parties arrived at impasse.

Beginning on July 20, and continuing during the subsequent negotiations on August 4 and 14, Hulteng repeatedly announced that Honda was at final position. The import of these statements was reinforced by the issuance of proposals delineated as "final": a final on June 22, on June 27, on July 20, on July 25, and on August 10 (R. Exhs. P-38, 39, 39A, 40, 41). In *Industrial Electric Reels, Inc*., 310 NLRB 1069 (1993), the Board recognized that while statements made at the bargaining table may be evidence of bad-faith bargaining, "the Board is careful not to `throw back in a party's face remarks made in the give and take atmosphere of collective bargaining' because to do so would frustrate the Act's policy of encouraging free and open communications between the parties." Here, however, the effect of Hulteng repeatedly stating that Honda was at final position when it wasn't, was to impede and deter the Machinists from making proposals of its own because the Union must have felt it would have been futile to do so. I recognize that notwithstanding my analysis, Boltuch did make proposals, including some on August 14, but I persist in finding that the

Union's negotiations were impeded by Honda's bargaining tactics referred to above.[52]

I am most persuaded that Honda did not bargain in good faith by its commission of unfair labor practices which I will find below. Based on those findings, I find that Honda did not bargain to impasse with the Machinists and therefore violated Section 8(a)(5) of the Act when it implemented its final offer.

b. Direct dealing with employees

All agree that during the course of negotiations, Honda held a series of meetings for bargaining unit employees—both Machinists and Teamsters. There is a dispute about what was said at the meetings. For example, according to General Counsel witness Walter Leedle, a former Honda employee, who worked there between May 1986 and July, he was one of a group of Honda employees who attended a meeting in Boas' office in early June. The meeting began when Boas said we are here to discuss pending negotiations with the Union on a possible new contract. During this meeting, Boas asked Leedle, then working as a lead service advisor and represented by the Machinists, how much it cost him to live at his current standard of living. Leedle responded about $1000 per week. Then Boas asked if Leedle was happy with the Union's retirement plan. Leedle answered he was happy; Boas responded that an alternative plan would cost less, but be just as effective or better. When Leedle asked why Honda couldn't keep the old retirement plan, Boas said this was not possible.

Another former service writer for Honda employed between September 1981 and October was Carl Asaro, a witness for General Counsel. In July, Asaro, a member of the Machinists bargaining unit, attended a meeting in the office of Honda's service manager, Ken McCully. McCully asked Asaro and other employees individually, if they would honor the picket line if a strike was called, because they would not have jobs when they returned from the strike.[53] On cross-examination, Asaro said that McCully may have talked about replacing employees who went on strike, but the result was the same, the strikers would have no jobs when the strike was over.

Still another General Counsel witness was Edmund Schmitt, a retired Honda mechanic, and member of the Machinists bargaining unit. In July, Schmitt was employed by Honda and attended a meeting with about four other employees and Boas. After Boas reviewed the history of the dealership, he asked each employee what they liked and didn't like about the union contract. Boas asked if the employees would like higher wages and different working conditions and more tools. Boas discussed at length the health and welfare and retirement plans which had special appeal for Schmitt who was then approaching retirement. Boas said he desired to substitute a retirement plan then in place for nonbargaining unit employees, and have it cover bargaining unit employees as well.

Another bargaining unit employee who attended the Boas meeting with Schmitt was Robert Hollingsworth, a former Honda employee who worked there between March 1988 and November 1991. In his testimony, he described two to three meetings with Boas, the first of which occurred in late July in Boas' office. Boas talked about an approaching strike and asked the employees how they felt about it. Hollingsworth essentially corroborated Schmitt except provided additional details of Boas as an advocate for his proposals. In a second meeting, Hollingsworth focused on Cam Chamberlain, a current employee of Honda and member of the Machinists unit. Under the new Boas' pay plan, Chamberlain's wages, according to Boas, would go from $2000 in 1 month to about $3400 in the next month. In his testimony, Chamberlain corroborated Hollingsworth and also told how Boas stated at a meeting that he would not retreat from his final proposal and that anyone who didn't like it could "hit the bricks." A recurring additional theme in the Boas meetings according to all the witnesses was the approaching strike and what employees intended to do about it.

The final General Counsel witness on this point was David James, a former Honda service writer between January 1988 and August. James testified he had a meeting with Boggs in late July wherein Boggs asked what he would do in the event of a strike. James said he would not cross the picket line. Then Boggs outlined the employer's proposal and asked the witness what he thought of it. James answered that he didn't think much of it, but Boggs said this would be the only offer employees would receive, so "take it or leave it."

I credit the testimony of the four former and one current Honda employees quoted above. In crediting these General Counsel's witnesses, I have also reviewed the testimony of Respondents' witnesses. Thus John Richards testified he attended a meeting with Schmitt, but couldn't recall Boas asked Schmitt any question. Nor did Boas ask any questions of employees at a second meeting Richards attended. I have also considered the testimony of Gregory Kemp, Honda's parts manager for 4-1/2 years who testified for Respondents. He testified that Boas hosted a series of meetings, explained his proposals and responded to employee questions, but asked no questions of employees. The newly hired General Manager Bill Boggs also testified for Respondents. His testimony, like that of Richards and Kemp, essentially corroborated Boas as to what happened at the employee meetings. However, I didn't believe the Honda witnesses on this point, none of them. I find that General Counsel's witnesses gave adequate detail, were credible in their presentation, and in the case of Chamberlain, his current employee status entitled his testimony to heightened credibility. See *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

I also find that General Counsel's witnesses recite a pattern of direct dealing by Boas with employees that cannot be denied and which violate Section 8(a)(5) of the Act. See *Beaumont Glass Co*., supra. *Texaco, Inc*., 233 NLRB 375 (1977). Intertwined with the direct dealing is a series of unlawful interrogations and coercive statements which violate Section 8(a)(1) of the Act. See *Kona 60 Minute Photo*, 277 NLRB 867 (1985);

[52] General Counsel argues, Br., vol. I, pp. 214–216, that evidence of bad-faith bargaining is provided by Franklin's refusing to agree on a method for selecting an arbitrator. However, at fn. 169, General Counsel also states that the 1986–1989 agreement did not contain any method for the selection of an arbitrator. In addition, the grievance and arbitration section of Honda's final offer apparently was never implemented (R. Exh. C-211A). In light of these facts and my additional findings of unfair labor practices below regarding Honda, it is unnecessary to decide the issue raised by General Counsel.

[53] After Asaro completed his testimony, General Counsel moved [twice] to amend the complaint to allege conversations with McCully and Boas in July, as 8(a)(1) violations. General Counsel also alleged that McCully was the service manager and a statutory supervisor (Tr. pp. 1189, 2872). Honda denied both allegations as to status and as to interrogations (Tr. pp. 1189, 2873). General Counsel then stated he would prove McCully's supervisory status through Respondents' witnesses (Tr. p. 2873).

Southwire Co. v. NLRB, 820 F.2d 453 (D.C. Cir. 1987). In sum, I find that Boas violated the Act by dealing directly with employees and asking the questions of them and making the statements to them as described by the witnesses.[54] See *NLRB v. Shelby Memorial Home*, 1 F.3d 550, 559–560 (7th Cir. 1993). Boas' statement to Chamberlain, to wit, anyone who didn't like it, could "hit the bricks," is another example of Boas' coercive statements to employees. Respondents mistakenly describe Chamberlain as "another former technician" (Br., p. 231), when he is a current employee of Honda's (Tr. p. 1211). Then Respondents make a more serious error by describing Boas' statement to Chamberlain as merely telling employees they could go out on strike (Br., p. 232). I interpret Boas' statement to mean, if employees didn't like his proposal, they could leave their job. This violates Section 8(a)(1) of the Act and I so find.

The sum total of Boas and Boggs talking to employees in the manner indicated, while at the same time the Machinists were attempting to negotiate a new labor agreement was to undercut the Union and, along with additional unfair labor practices found below, preclude any impasse from occurring.

c. Lockout of employees

I have discussed the issue of lockout of employees above in connection with German/Machinists. I have considered Respondents' argument (Br., p. 190–194)[55] and find that extended discussion is not warranted. I find the lockout was motivated by the same bad faith as the declaration of impasse. Both were part and parcel of a pattern which leads me to find that it was the [employers'] intent to avoid their bargaining obligations in violation of Section 8(a)(1) and (5). *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991). In light of the above, I find that Honda's lockout of the Machinists violated Section 8(a)(3) of the Act.[56]

d. Machinists strike

On or about August 22, officials of the Machinists called a strike at Honda. The issue is whether this strike and another called by the Teamsters were economic or unfair labor practice strikes. The distinction is important: where a strike is caused in whole or in part by the employer's unfair labor practices, the striking employees are entitled to reinstatement upon their unconditional offer to return to work. *Boyles Galvanizing Co*., 239 NLRB 530 (1978). According to General Counsel's witness Schmitt, neither he nor other Honda employees knew in advance that the Machinists intended to call a strike beginning on August 27. Instead, on that day, two Machinists business representatives J.B. Martin and Chuck Netherby showed up at Honda as employees were beginning to start work and told employees that the strike was on. When employees inquired about the reason for the strike, Martin and Netherby explained that Honda wouldn't come to the bargaining table, and although the Union was trying to negotiate to move things along, Honda was trying to make deals with different individuals, trying to get employees to drop the Union and work for themselves (Tr. p. 1173).

Boggs testified that in late July picketing and leafleting began at Honda, primarily on weekends. One of the leaflets handed out reads as follows:

> BOYCOTT S.F. HONDA
> ROGER BOAS
>
> Can you ever trust Roger Boas again?
>
> We doubt if we can;
>
> We doubt if we can trust S.F. (Boas) Honda, the business Roger Boas owns.
>
> We suggest that you don't trust S.F. (Boas) Honda either.
>
> Please patronize the Union Honda dealers listed below:
>
> Auto West Honda
> Jim Close House of Honda
> Grace Honda
> Jim Doten Honda
> El Cerrito Honda/British, Ltd.
> Sheppard Pontiac-Honda
> Val Strough Oakland Honda
> Walnut Creek Honda
> Winter Chevrolet Honda
> Lloyd A. Wise Honda
>
> Thank you for your cooperation,
>
> AUTOMOTIVE MACHINISTS LOCAL 1305
> TEAMSTERS LOCAL 665

[R. Exh. 74.]

Honda locked out its Machinists employees on August 15 after an August 11 notice to employees explained Honda's rationale (R. Exh. 76). The August 22 strike by both the Teamsters and Machinists lasted through early October when picketing ceased. Thereafter some strikers returned to Honda and some didn't.[57] According to Boggs, neither union ever officially gave formal notice to Honda that the strike was over and that employees were making an unconditional offer to return to work.

In this case only Honda withdrew flat rate from its proposals; yet only Honda experienced a strike—a strike which lasted for about 5 weeks. I further find that the Honda/Machinists strikers were unfair labor practice strikers. See *C-Line Express*, 292 NLRB 638, 639 (1989).

[54] As to the statements allegedly made by McCully, I note he never testified and that the unrebutted testimony of Boggs is that McCully left Honda on June 2 (Tr. 5174). Respondents raise a statute-of-limitations argument as to this allegation (Br., p. 235–236). It is unnecessary to consider that argument nor the discrepancy as to dates, because I find General Counsel has failed to prove McCully's supervisory status. An employee's title does not determine his status. See *Waterbed World*, 286 NLRB 425 (1987). There must be actual evidence that an individual alleged as a supervisor had or possessed one or more of the indicia of supervisory authority set forth in Sec. 2(11) of the Act. Based on this failure of proof, I will recommend dismissal of the allegation involving McCully.

[55] Respondents mistakenly state at p. 190 of the brief that the complaints allege that Honda violated the Act when it locked out employees represented by Machinists 1305 and Painters 1176. Par. 13 of the complaint alleges a violation of the Act for the lockout against the Machinists and Teamsters (GC Exh. 2aa).

[56] It is unnecessary to consider the effect of the paragraph from the collective-bargaining agreement allowing Honda to take economic action before any change in terms and conditions of employment is made. This provision of the agreement under the circumstances of this case does not constitute a valid defense to Sec. 8(a)(3) of the Act.

[57] According to Boggs, all Honda strikers, Machinists and Teamsters who desired to return to work were permitted to do so. In addition, Boggs provided testimony that some employees may have abandoned their jobs at Honda to take other jobs. None of this concerns me now. Instead, these matters can be taken up in compliance.

e. Withdrawal of recognition

Once again, the evidence shows a petition appearing, as if by magic on the desk of Honda official Boggs as he came to work on or around November 21. The petition reads in hand print, "We the technicians of S.F. Honda no longer wish to be represented by Union Local 1305 as of 11-2-89." In addition the petition contained the apparent signatures of a majority of Machinists bargaining unit employees (R. Exh. 78). This conclusion is based on a typed list of Machinists bargaining unit employees as of November 21, entered into the record without objection (R. Exh. 79). Handwriting exemplars were also admitted into evidence (R. Exh. 80).[58]

In addition to the documentary evidence, Respondents presented certain witnesses who voluntarily signed the petition. For example, John Richards, a current employee at Honda since March 1986 testified that he received the petition from Tony Cardaropoli, a new mechanic at Honda who was hired during the strike. Cardaropoli asked Richards if he desired to sign the petition which he did. Another employee who signed was Respondents' witness Paul Phong To, employed as a mechanic since September 1988. Finally, Respondents called Fausto Casallas, a current employee at Honda for the past 19 years, who also signed the petition.

On December 8, Hulteng wrote to Boltuch giving notice of withdrawal of recognition by Honda of the Machinists bargaining unit. This act, said Hulteng, is based on the receipt of objective evidence which causes the Company to doubt in good faith that the Union any longer represents its employees (R. Exh. C-263).

Since the withdrawal of recognition must, to be effective, occur in a context free of unfair labor practices, I find that Honda has failed to meet that standard. Accordingly, I find that Honda's attempted withdrawal of recognition was ineffective and instead violated Section 8(a)(5) of the Act.

8. Honda/Teamsters (20–CA–23049)

a. Impasse—conclusions

The parties had five bargaining sessions in which the issues were discussed. No agreement was reached and no unfair labor practices are alleged other than a declaration of impasse, when no impasse existed and other than derivative unfair labor practices. I begin my analysis with Boltuch's behavior, particularly at the July 14 and August 7 sessions. While Franklin's behavior at the latter session is not above reproach—I find that she badgered and provoked Boltuch to a certain extent, on the whole Boltuch has no one to blame but himself for his behavior. The two employee witnesses, Robles and Montedaro, gave testimony more convincing than other witnesses, because they were more objective and less aligned with one side or the other. I note that after the August 7, bargaining session each side was motivated to write self-serving letters giving their versions of what happened during that final session.

Honda must prove the parties were at impasse. Its evidence is convincing. During the hiatus between June 16 and July 14, Boltuch and/or Allen could have met with or attempted to meet with Wyatt & Co. to get information regarding the Boas pension plan, perhaps the single most important element of the Honda/Teamsters proposals. No credible reason was given why such a meeting wasn't possible. It is true, as General Counsel points out in her brief, volume II, page 19, on August 7, Boltuch expressed agreement on the concept of commission for parts employees. However, I find this illusory. Where such a statement is made at the 11th hour and no concrete proposal is tendered, the value of the "concession" is limited indeed. This union strategy has been seen before in this case. I note that the August 7 meeting ended when a representative of the Engineers & Scientists Hall told Honda's representatives they were making too much noise and had to leave. This eviction is truly suspect and I find that the Teamsters could have easily prevented it.

I find that by August 7, the prospects of reaching agreement had been exhausted and Honda has met its burden of proving impasse. This is based on my additional finding that Teamsters' concessions such as they were, were based implicitly or explicitly on a tradeoff of reaching agreement on other issues such as pension, wages (commission) and health and welfare on which Honda was entitled to stand fast.

Finally, I note that in all or most other segments of this case, General Counsel has argued primarily that surrounding unfair labor practices have precluded impasse. No surrounding unfair labor practices are alleged for Honda/Teamsters. Accordingly, focusing exclusively on the bargaining sessions convinces me the parties were at impasse and I will recommend dismissal of this allegation. In light of this conclusion, I will also recommend dismissal of derivative allegation alleging an unlawful lockout of Teamsters employees and alleging that the Teamsters strikers were unfair labor strikers.

Conclusion

I have found above in certain particulars that impasse has not been proven. At pages 167–176 of their brief Respondents argue that even where no impasse exists, Respondents were privileged to implement their final offers because of union tactics of avoidance and delay. In making its argument, Respondents are attempting to paint with a wide brush. I have accepted their argument in some cases and rejected it in others, particularly where there were surrounding unfair labor practices which served to undermine the Union. So I reject Respondents' argument as a general defense to the unilateral changes contained within this case.

One final thought: I have attempted to consider each segment of this case on its own merits. Yet, I cannot conclude without noting the similarities surrounding the decertification-like petitions. Here we have three supposedly unrelated business entities, indeed to a certain extent competitors—each of which has a company official come to work one day and find on his desk an antiunion petition. And no one knows who prepared it, or how it got on the official's desk. And the majority of bargaining unit employees who apparently signed each petition did so without management taint. Yes, all of that is hard to believe. However, unless and until evidence was presented to show that the withdrawal of recognition based on the petitions was otherwise improper, I refused to reject the petitions based merely on the similarities of how they originated and how they were deposited on the managers' desks.

CONCLUSIONS OF LAW

1. The Respondents, Royal Motor Sales, German Motors Corp., and San Francisco Honda, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[58] The handwriting exemplars, R. Exh. 80, are missing from the bound volume of exhibits delineated "Respondent's Original Exhibits 68 thru 87," and I cannot account for their absence.

2. The Unions, Teamsters Automotive Employees Local 665, International Brotherhood of Teamsters, AFL–CIO; Automotive Machinists Local Lodge 1305, and Machinists Automotive Trades District Lodge No. 190 of Northern California, International Association of Machinists and Aerospace Workers, AFL–CIO; and Auto, Marine and Specialty Painters Union, Local 1176 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Royal Motor Sales violated Section 8(a)(1) of the Act by a supervisor telling an employee that he could make more money if the Union wasn't there; by a supervisor telling another employee that those employees who were going to stay were going to be nonunion and that anyone who stayed would have to be nonunion or be replaced; and by a supervisor telling another employee that it was useless to wear a union hat because there wasn't going to be a union anymore; and by a supervisor asking an employee to sign a decertification-like petition and offering the employee a bonus to sign the petition.

4. Respondent Royal Motor Sales violated Section 8(a)(1) and (5) of the Act by unilaterally implementing its final offer to the Teamsters, at a time when it had not bargained to impasse and by attempting to withdraw recognition from the Teamsters service and parts units, thereby refusing to bargain at a time when Royal Motor Sales did not doubt in good faith the Teamsters majority status.

5. The Teamsters is, and was at all times material to this proceeding, the exclusive bargaining representative of Royal's service and parts employees into the following appropriate units:

> All service employees employed by Royal Motor Sales at its San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act.
>
> All parts employees employed by Royal Motor Sales at its San Francisco, California facility; excluding all other employees, guards and supervisors as defined in the Act.

6. Respondent German Motors Corp. violated Section 8(a)(1) of the Act by a supervisor telling an employee that he would be better off without the union, and by telling the same employee that if he didn't like to work there in a nonunion setting, he could find a job elsewhere, by a supervisor telling an employee he could make more money under a flat rate system; by a supervisor telling an employee that a benefit plan wasn't available to him because he was in the union and the union was opposed to it; and by a supervisor telling an employee, "this is a time for no unions."

7. Respondent German Motors Corp. violated Section 8(a)(1) and (5) of the Act by dealing directly with employees who were represented by a labor organization, and by making unilateral changes not reasonably comprehended within the earlier offers to the Union; and by attempting to withdraw recognition from the Machinists and from the Teamsters, thereby refusing to bargain at a time when German Motors Corp. did not doubt in good faith the Machinists and/or Teamsters majority status; and by unilaterally implementing its final offer to the Teamsters at a time when it had not bargained to impasse; by a supervisor dealing directly with an employee who was represented by a labor organization and by conferring with the employee on the content of proposals to be presented to the Union; and by holding meetings with bargaining unit employees to present benefit proposals then being negotiated.

8. The Teamsters is, and was at all times material to this proceeding, the exclusive bargaining representative of German's employees in the following appropriate units:

> All full-time and regular part-time employees employed by German Motors Corp. whose job classifications were covered by the 1986-89 Parts agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time employees employed by German Motors Corp. whose job classifications were covered by the 1986-89 Service agreement between the Teamsters Union and Respondent German, excluding office clerical employees, guards and supervisors as defined in the Act.

9. Respondent San Francisco Honda violated Section 8(a)(1) and (5) of the Act by unilaterally implementing its final offers to the Machinists at a time when it had not bargained to impasse; by dealing directly with employees who were represented by a labor organization; by a supervisor holding meetings with bargaining unit employees to ask employees what they liked and didn't like about the union contract; by telling one employee, anyone who didn't like the Honda proposal could "hit the bricks"; and by attempting to withdraw recognition from the Machinists thereby refusing to bargain at a time when San Francisco Honda did not doubt in good faith the Union's majority status.

10. The Machinists is, and was at all times material to this proceeding, the exclusive bargaining representative of San Francisco Honda's service and parts employees in the following appropriate unit:

> All full-time and regular part-time employees employed by San Francisco Honda whose job classifications were covered by the 1986-89 collective bargaining agreement between San Francisco Honda and the Machinists; excluding all other employees, guards and supervisors as defined in the Act.

11. Respondent San Francisco Honda violated Section 8(a)(1) of the Act by locking out Machinists bargaining unit employees in bad faith.

12. San Francisco Honda Machinists strikers were unfair labor strikers.

13. Other than specifically found above, Respondents committed no other unfair labor practices.

14. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith by unilaterally implementing "final" proposals without bargaining to impasse, it is recommended that on request of the Unions, Respondents be ordered to rescind all or part of the implemented "final" proposals, and to bargain in good faith with the Unions as the exclusive bargaining agents of the above appropriate units of its employees with respect to their wages, hours and other terms and conditions of employment and embody any understanding reached in a signed agreement.

Inasmuch as the San Francisco Honda/Machinists strike which began August 22 was an unfair labor practice strike, it is recommended that when the strikers (including sympathy strikers), unconditionally offer to return to work they be reinstated by San Francisco Honda to their former jobs or to a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed.

Having found that Respondents violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes in wages and benefits, I shall also recommend that Respondents be ordered to remit all payments it owes to fringe benefit funds, with interest, as specified in *Merryweather Optical Co*., 240 NLRB 1213 (1979), and to make whole the employees for any expenses they may have incurred as a result of the Respondents' failure to make such payments in the manner set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). The Respondents shall also make whole its employees for any loss of wages and benefits they may have suffered by reason of the Respondents' failure to pay contractually required wages and benefits in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). All payments to employees shall be made with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]